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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
MODESTO DIVISION

In re ) Case No. 09-93249-E-11

MICHAEL KENNETH NEMEE and )  
MICHELLE SEOBHAND MCKEE NEMEE, )

Debtors. )

MICHAEL KENNETH NEMEE and ) Adv. Proc. No. 09-9088  
MICHELLE SEOBHAND MCKEE NEMEE, )

Plaintiffs, )

v. )

COUNTY OF CALAVERAS, )

Defendant. )

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM OPINION AND DECISION

This Adversary Proceeding presents the court with competing contentions by Michael and Michelle Nemee, the Plaintiff/Counter-Defendants ("Plaintiffs"), the Chapter 11 Debtors, and the County of Calaveras, California, the Defendant/Counter-Claimant ("County") as to the proper interpretation and application of the Calaveras County Zoning Ordinances. The real property at issue consists of a 160-acre parcel and 120-acre parcel, both in Calaveras County

1 ("The Property") which are owned by the Plaintiffs and are property  
2 of their bankruptcy estate.<sup>1</sup> On this bankruptcy estate property,  
3 the Plaintiffs have constructed and are operating a commercial 18-  
4 hole golf course through Trinitas Enterprises, LLC, a limited  
5 liability company they own, which is also property of the  
6 bankruptcy estate. Plaintiffs assert that the development and  
7 operation of a commercial golf course on The Property are permitted  
8 as "Agritourism" under the Calaveras County Zoning Ordinances.  
9 Alternatively, if the commercial 18-hole golf course is not  
10 Agritourism, Plaintiffs assert that the County is equitably  
11 estopped from asserting that the use and operation of this  
12 commercial golf course by the Plaintiffs violates the Zoning  
13 Ordinances. The County has not only answered the Second Amended  
14 Complaint denying the allegations and requesting judgment in its  
15 favor, but also filed a counterclaim for injunctive relief from  
16 this court to enjoin the alleged violations of the County Zoning  
17 Ordinances.

18 Prior to and during the pendency of this litigation, the  
19 development and use of The Property as a commercial 18-hole golf  
20 course was the subject of County review and nonjudicial political  
21 proceedings before the Calaveras County Board of Supervisors. When  
22 that nonjudicial process failed to produce a satisfactory  
23 resolution for the Plaintiffs, they continued with the prosecution  
24 of this Adversary Proceeding, which concluded with a three-day  
25 court trial. Through this trial the parties presented extensive  
26 evidence concerning the decade-long odyssey involving the

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28 <sup>1</sup> Calaveras County, California Assessor Parcel Nos. 50-052-  
41 and 050-052-42.

1 Plaintiffs, the County, investors, members of the golf club  
2 operated on The Property, and other persons who envisioned a golf  
3 course and destination resort known as the Ridge at Trinitas on The  
4 Property.<sup>2</sup>

PROCEDURAL HISTORY OF THE ADVERSARY PROCEEDING,  
FEDERAL COURT JURISDICTION,  
AND  
FINAL DETERMINATION BY THE BANKRUPTCY COURT

This Adversary Proceeding was originally commenced by Plaintiffs in the California Superior Court, Calaveras County. The original state court complaint was filed on May 15, 2009, with a first amended state court complaint filed on September 15, 2009. On October 7, 2009, the Plaintiffs commenced their voluntary Chapter 11 case in this court.<sup>3</sup> The Plaintiffs filed a second amended complaint in the state court action on December 7, 2009 ("Second Amended Complaint"). While a demurrer to the Second Amended Complaint was pending, Plaintiffs removed the state court action to this court pursuant to 28 U.S.C. § 1452 on December 29, 2009. The County then filed a motion with this court to remand the action back to the state court or abstain hearing the issues in this Adversary Proceeding. The County also filed a motion for the remand of or abstention by this court for a second adversary proceeding which Plaintiffs removed to this court.<sup>4</sup> In the second

<sup>2</sup> Though the development concept for The Ridge at Trinitas is much greater than an 18-hole golf commercial golf course, the matter before the court does not seek a determination as to the proposed subdivision, lodge, spa, and other amenities which the Plaintiffs sought to develop on The Property in Calaveras County.

<sup>3</sup> Eastern District of California Case No. 09-93249.

28                 <sup>4</sup> Eastern District of California, Adversary Proceeding No.  
09-9089

1 removed action, Plaintiffs sought a writ of mandate against the  
 2 County relating to their land use application for The Property.<sup>5</sup>  
 3 The court granted the motion to remand the adversary proceeding for  
 4 a writ of mandate, in large part based on the representations by  
 5 the County that the matter was ready to proceed to trial in the  
 6 state court, that a CEQA-experienced judge was assigned to the  
 7 state court proceedings, and that matter would be tried on  
 8 April 10, 2010, if remanded to the state court.<sup>6</sup> This court denied  
 9 the motion to remand this Adversary Proceeding, determining that  
 10 the bankruptcy court was the proper forum to address the issues  
 11 concerning the use and reorganization of The Property in the  
 12 Chapter 11 bankruptcy estate.<sup>7</sup>

13 Following the decision not to remand or abstain from this  
 14 Adversary Proceeding, the County filed a motion to dismiss the  
 15 Second Amended Complaint. The court granted the motion and  
 16 dismissed all claims except (1) for declaratory relief that the  
 17 commercial 18-hole golf course was permitted as "Agritourism" on  
 18 The Property and (2) that the County was equitably estopped from  
 19 asserting that the 18-hole commercial golf course was not permitted  
 20 as Agritourism on The Property.

21 \_\_\_\_\_  
 22       <sup>5</sup> The writ of mandate sought relief under the California  
 23 Environmental Quality Act ("CEQA") and a declaration that County  
 24 employees acted in violation of CEQA and state planning laws.  
 25 The Plaintiffs requested that the court order the County to  
 complete an environmental impact report ("EIR"), and order which  
 employees and consultants of the County would be permitted to  
 work on the EIR.

26       <sup>6</sup> Though remanded, this state court action has not gone to  
 27 trial and neither party asserted that any determinations made in  
 that action resolved issues in this Adversary Proceeding.

28       <sup>7</sup> Dckt. 34, 38.

1       The County then filed its Answer denying the allegations for  
 2 the two remaining causes of action in the Second Amended Complaint  
 3 and requesting that the court enter judgment on all claims against  
 4 the Plaintiffs. In addition, the County filed a counterclaim for  
 5 injunctive relief from this bankruptcy court to enjoin the  
 6 Plaintiffs from using The Property as a commercial golf course  
 7 because such development and use violates of the Calaveras County  
 8 Zoning Ordinances and thereby constitutes a public nuisance.

9 **Federal Court Jurisdiction and Bankruptcy Court Proceedings**

10       Jurisdiction for this matter arises under 28 U.S.C. § 1334(b),  
 11 which provides for original but not exclusive federal court  
 12 jurisdiction for all civil proceedings arising under Title 11 (the  
 13 Bankruptcy Code), or arising in or related to cases under Title 11.  
 14 Federal court jurisdiction is exclusive for all property, wherever  
 15 located, of a debtor as of the commencement of the case and of  
 16 property of the estate. 28 U.S.C. § 1334(e)(1). A party may  
 17 remove a state court action to federal court if federal  
 18 jurisdiction exists under 28 U.S.C. § 1334. See 28 U.S.C. § 1452.

19       Congress vests in the bankruptcy courts, for matters referred  
 20 by the district court, jurisdiction for all proceedings arising  
 21 under Title 11, or arising in or related to a case under Title 11.  
 22 The United States District Court for the Eastern District of  
 23 California has referred to this bankruptcy court all matters  
 24 arising under, arising in or related to Title 11 as authorized in  
 25 28 U.S.C. § 157(a).<sup>8</sup> This bankruptcy court may thereon enter final  
 26 judgments and orders on all cases under Title 11, core proceedings

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 28       <sup>8</sup> United States District Court, Eastern District of California, General Orders 182 and 223.

1 arising under Title 11 or arising in a case under Title 11, and  
2 non-core proceedings to which the parties have consented, with all  
3 such rulings being subject to appellate review. 28 U.S.C.  
4 § 157(b)(1), (2), and (c)(2).

5 The issues in this Adversary Proceeding relate to the  
6 character and use of a commercial 18-hole golf court located on  
7 property of the Plaintiffs' bankruptcy estate. Congress has  
8 defined core proceedings in a non-exclusive manner to include  
9 (1) matters concerning administration of the estate, (2) order to  
10 turn over property of the estate, (3) determinations of the extent,  
11 validity, and priority of liens, (4) orders approving the use or  
12 lease of property of the estate, and (5) other proceedings  
13 affecting the liquidation of assets of the estate or the adjustment  
14 of the debtor-creditor relationship.<sup>9</sup> These matters arising in and  
15 under the Bankruptcy Code for management and administration of the  
16 bankruptcy estate and reorganization of a bankruptcy estate are  
17 essential parts of the federal bankruptcy scheme for reorganization  
18 as enacted by Congress. The specific issues presented to this  
19 court seek a determination of rights and interests in The Property  
20 (development and use as a commercial golf course), the ongoing  
21 operation of the commercial business on The Property as part of the  
22 bankruptcy estate, the rights and interests of the County  
23 concerning the use of this property of the bankruptcy estate, and  
24 the ability of the Plaintiffs to use this property of the  
25 bankruptcy estate and business though a Chapter 11 bankruptcy  
26 reorganization. This reorganization may include the continued  
27

28 <sup>9</sup> 28 U.S.C. § 157(b)(2)(A), (E), (K), (M), and (O).

1 operation of The Property as a commercial golf course, ownership  
2 and operation of Trinitas Enterprises, LLC, and liquidation of The  
3 Property, or realization of the value of The Property and operating  
4 business either through a sale or generating payments from such  
5 operations under a confirmed Chapter 11 Plan. As such, the matters  
6 presented to this court constitute core proceedings.

7       In the Counterclaim filed by the County, it is asserted that  
8 jurisdiction exists and is invoked by the County pursuant to  
9 28 U.S.C. §§ 1334 and 157. The County seeks injunctive relief from  
10 this bankruptcy court, to be determined and granted based upon  
11 determination of the same issues of law and fact as asserted in the  
12 Second Amended Complaint. The facts and law for the Second Amended  
13 Complaint and Counterclaim are the same, with the determination of  
14 such facts and law necessary to grant the relief requested by each  
15 party. The County has affirmatively and voluntarily invoked the  
16 jurisdiction of this bankruptcy court pursuant to 28 U.S.C. §§ 1334  
17 and 157, and has not only requested that this court deny the relief  
18 requested by the Plaintiffs, but has filed its Counterclaim for  
19 this court to enjoin the Plaintiffs from using this property of the  
20 bankruptcy estate as a commercial golf course. To the extent that  
21 this is a related matter under 28 U.S.C. § 157, all parties to this  
22 Adversary Proceeding have consented to and requested that this  
23 bankruptcy court hear and determine all of these matters, each  
24 affirmatively invoking the jurisdiction and power of this  
25 bankruptcy court. 28 U.S.C. § 157(c)(2).

26       Federal court jurisdiction existing for this Adversary  
27 Proceeding and this bankruptcy court having the authority to issue  
28 a final judgment thereon, the court makes the final ruling on all

1 issues in this Memorandum Opinion and Decision, and shall enter its  
2 judgments on the Second Amended Complaint and the Counterclaim.  
3

4 **FACTUAL FINDINGS CONCERNING THE ACQUISITION, USE, AND DEVELOPMENT  
OF THE PROPERTY, CONDUCT OF THE DEBTORS  
AND COUNTY CONCERNING THE DEVELOPMENT AND USE OF  
THE PROPERTY AS A COMMERCIAL GOLF COURSE**

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6 **Acquisition and Construction of Golf Course**

7       The Plaintiffs began acquiring parcels of real property  
8 located in Calaveras County, California, in 2001, which include The  
9 Property. Prior to that time, the Plaintiffs lived in Northern  
10 California and owned property on which Michael Nemee constructed  
11 several golf holes for his private, personal use. At the time the  
12 parcels were purchased in Calaveras County, The Property was being  
13 used as a cattle ranch and olive orchard. Though planted with  
14 trees, the olive orchard was not producing a marketable crop. The  
15 Plaintiffs purchased several parcels, obtained lot line  
16 adjustments, transferred title to portions of these properties, and  
17 had other persons added to title on portions of these properties.  
18 These include the 160-acre and 120-acre parcels which are zoned for  
19 agriculture and on which the commercial 18-hole golf course has  
20 been constructed and is being operated.

21       When The Property was acquired by Plaintiffs, it was zoned as  
22 Agriculture Preserve, which is limited to property that is subject  
23 to a Williamson Act Contract, thereby restricting the uses of and  
24 the tax basis for such Agriculture Preserve properties.<sup>10</sup> In 2001,  
25 the Plaintiffs commenced a survey of The Property, which resulted  
26 in the County receiving complaints of potential unauthorized  
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<sup>10</sup> Cal. Gov. Code § 51200 et. seq.

1 development on The Property. Dan Hendrycks, a planner with the  
2 County, wrote a letter dated August 9, 2001, informing the  
3 Plaintiffs that the County had received complaints that the  
4 Plaintiffs were constructing a golf course on The Property.  
5 Mr. Hendrycks states in his letter that a golf course, whether for  
6 public or private, personal use, was not allowed on property zoned  
7 as Agriculture Preserve under the County's ordinances in 2001.

8 Michael Nemee sent a written response, dated August 14, 2011,  
9 directing Mr. Hendrycks to speak with Tom Jeffries (an engineer  
10 hired by the Plaintiffs) concerning The Property and any  
11 development thereon. Further, Michael Nemee asserted in his letter  
12 that he had spoken with Jerry Howard, the Calaveras County  
13 Agricultural Commissioner, concerning the agricultural uses for The  
14 Property. Michael Nemee did not discuss or disclose in his letter  
15 any ongoing or intended construction of a golf course on The  
16 Property.

17 With respect to the referenced conversation with Jerry Howard,  
18 Michael Nemee testified at trial only that Jerry Howard told him  
19 that Mr. Howard did not believe the construction of a golf course  
20 for private, personal use by the property owner was a violation of  
21 the Williamson Act. Michael Nemee did not testify that Jerry  
22 Howard told him that a golf course was a permissible use of The  
23 Property under the Calaveras County Zoning Ordinances. Jerry  
24 Howard testified at trial that he had one meeting with Michael  
25 Nemee at The Property, saw an existing olive orchard and the  
26 construction of golf holes which he understood from Michael Nemee  
27 would only be for the private, personal use of the Plaintiffs.  
28 Further, Jerry Howard testified that any discussion that he had

1 with Michael Nemee concerning use of The Property as a private,  
2 personal use golf course were only in the context of Williamson Act  
3 restrictions and not the Calaveras County Zoning Ordinances. Jerry  
4 Howard further testified that Zoning Ordinance issues were not  
5 within his jurisdiction as the Calaveras Agricultural Commissioner  
6 and he would not purport to make statements concerning compliance  
7 with the Zoning Ordinances.

8 Based on the evidence before the court, Jerry Howard's  
9 communications with Michael Nemee were limited to Plaintiffs  
10 constructing a private, personal use a golf course on The Property,  
11 and that Mr. Howard did not see such private, personal use as  
12 conflicting with the Williamson Act. At that point in time,  
13 Michael Nemee represented to Jerry Howard that any golf hole  
14 construction work being done on The Property was solely for the  
15 private, personal use of the Plaintiffs as the land owners.

16 By a letter dated August 20, 2001, Tom Jeffries of Jeffries  
17 Engineering, the agent of the Plaintiffs, responded to Mr.  
18 Hendrycks' correspondence concerning the complaints. In this  
19 letter, Mr. Jeffries affirmatively states that the Plaintiffs  
20 contemplated installing a golf course in the future, but no on-  
21 site work had been done to install or develop such use. Further,  
22 the Plaintiffs had crews surveying The Property to accurately  
23 depict boundaries and other natural features. Though no golf  
24 course construction was disclosed, Mr. Jeffries informed Mr.  
25 Hendrycks that the Plaintiffs wished to install a vineyard, and to  
26 do so would require that a portion of The Property be graded.<sup>11</sup>

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27  
28       <sup>11</sup> No evidence was presented to the court of the  
construction of a vineyard or any grading work done for a

1 Mr. Jeffries further asserts in his letter that the County has not  
2 presented "any evidence of the construction of a golf course" and  
3 affirmatively represents for the Plaintiffs that a golf course is  
4 not under construction. This stands in contrast to the testimony  
5 of Mr. Nemee and Mr. Howard of their conversation, which pre-dates  
6 Mr. Jeffries August 20, 2011 letter, that the Plaintiffs were in  
7 the process of constructing a private, personal use golf course on  
8 The Property.

9 The August 14, 2001 letter from Mr. Nemee and the August 20,  
10 2001 letter from Mr. Jeffries are typical of what has been shown to  
11 be recurring conduct of the Plaintiffs in dealing with the County.  
12 First, the Plaintiffs take a portion of comments by one County  
13 representative and attempt to utilize it out of context to advance  
14 their desired development of The Property. Next, the Plaintiffs  
15 and their representative issue carefully worded statements which  
16 fail to fully or accurately disclose actual facts concerning the  
17 development of The Property and Plaintiffs' conduct. In the Summer  
18 of 2001, the Plaintiffs have their agent Mr. Jeffries stating to  
19 the County that no construction is taking place for a golf course  
20 on-site. However, Jerry Howard testifies that not only had he  
21 observed a golf course being constructed, but that he and Michael  
22 Nemee discussed the then ongoing construction of a private,  
23 personal-use golf course for the Plaintiffs. The court finds the  
24 statements for Plaintiffs made by Mr. Jeffries for his principals  
25 in this letter to be creatively misleading at best and  
26 intentionally false at worst.

27 \_\_\_\_\_  
28 vineyard. The grading work done by the Plaintiffs was for  
construction of the 18-hole commercial golf course.

The Plaintiffs' activities continued and by 2003 the Calaveras County Building Department became involved with respect to the ongoing construction and development of The Property. By a letter dated August 27, 2003, Ray Waller of the Calaveras County Building Department notified the Plaintiffs that the County had received numerous complaints about a massive grading project on The Property. Mr. Waller notified the Plaintiffs that they were required to obtain and submit engineering and grading plans pursuant to the Calaveras County Ordinances. With respect to this grading activity and the development of The Property, Michael Nemee's testimony establishes that as of August 2003, the Plaintiffs were in the process of constructing the commercial 18-hole golf course, which is on The Property today.<sup>12</sup> Further, Michael Nemee testified that starting in 2001, he had begun the drawings to develop The Property for an 18-hole golf course. The court finds that the Plaintiffs intended, as early as 2001, to construct an 18-hole golf course on The Property. Further, that this was done as an intended larger commercial development including a lodge, clubhouse, restaurant, bar, and golf academy, not one for the private, personal use by the Plaintiffs as the

22       <sup>12</sup> The court uses the term "commercial 18-hole golf course"  
23 as one in which the Plaintiffs were engaged in an economic  
24 enterprise to generate revenues or other remuneration from the  
25 operation of the golf course for use by persons other than the  
26 Plaintiffs as the owners of The Property. The testimony provided  
27 is that the Debtors have been charging fees to the public and  
28 selling memberships for the use of the golf course, as well for  
tournaments open to the public or for closed groups. The phrase  
"private, personal use" of a golf course means the actual use by  
the two Plaintiffs personally or with their friends and family  
for which no monetary or other remuneration is obtained, either  
directly or indirectly, by the Plaintiffs for such use.

1 owners of The Property.<sup>13</sup>

2 On October 1, 2003, Michael Nemee sent a letter to Wes  
3 Hodgson, a Calaveras County Planning Commissioner. The letter does  
4 not disclose the then ongoing development of the 18-hole golf  
5 course on The Property, but only that the Plaintiffs sought a  
6 change in the Calaveras County Zoning Ordinances to allow golf  
7 courses as a conditional use for any property zoned Agriculture  
8 Preserve. This letter dated October 1, 2003, demonstrates that the  
9 Plaintiffs clearly understood that a golf course was not permitted  
10 on The Property under the then existing Calaveras County Zoning  
11 Ordinances. Though this letter is on Michael Nemee's letterhead,  
12 is signed by Michael Nemee, and sent by Michael Nemee intending to  
13 communicate specific information to Mr. Hodgson, Michael Nemee  
14 disavowed portions of his statements in the letter. Michael Nemee  
15 testified at trial that while he signed the October 1, 2003  
16 letter, it had been prepared for him by one of his professionals  
17 and that he did not read the letter before signing it. Several  
18 times during trial Mr. Nemee attempted to disavow knowledge of  
19 information in correspondence or documents signed and sent by him  
20 or by his professionals, upon which others persons and the County  
21 were to rely, by testifying that he did not read the correspondence  
22 or documents before signing them. The court does not find such  
23 testimony by Michael Nemee credible.

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24  
25       <sup>13</sup> The court has not found evidence to support a contention  
26 that the Plaintiffs intended to develop and use the 18-hole golf  
27 course for their private, personal use. Further, as borne out by  
28 the creditors in this case and the loans obtained by the  
Plaintiffs, no evidence has been presented that the Plaintiffs  
had or have the economic resources to develop and construct an  
18-hole golf course on The Property for their private, personal  
use.

1       It is clear that the Plaintiffs were intimately involved in  
2 the development of The Property, the construction of the golf  
3 course, and the intended development of The Ridge at Trinitas as a  
4 destination resort.<sup>14</sup> The court is not persuaded by Michael Nemee's  
5 testimony and the other evidence submitted that the Plaintiffs were  
6 unaware of the representations which they, directly and through  
7 their professionals, were making to the County, Community Bank of  
8 San Joaquin, and other persons.<sup>15</sup>

9       By November of 2003, the Plaintiffs were notified by the  
10 Calaveras County Code Compliance Unit that an administrative  
11 hearing had been set to address alleged Zoning Code violations on  
12 The Property. The alleged violations focused on grading being done  
13 on The Property by Plaintiffs without a permit. At the request of  
14 a member of the Board of Supervisors, the administrative hearing  
15 was removed from the agenda so that the County and the Plaintiffs  
16 could attempt to resolve the issue. In response to the notice of  
17 administrative hearing, Robert Bliss of Jeffries Engineers, Inc.,  
18 an agent of the Plaintiffs, sent a letter dated November 20, 2003,  
19

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20                  <sup>14</sup> Michelle Nemee, the other Plaintiff, chose not to  
21 testify at trial. Her allegations in the Second Amended  
22 Complaint are the same as Michael Nemee's, and she has relied  
23 upon and presented testimony of witnesses and evidence through  
her attorney and co-plaintiff.

24                  <sup>15</sup> As developed in this decision, based on the evidence  
25 presented the court finds the Plaintiffs to be sophisticated  
business persons who engaged the services of multiple  
26 professionals to implement the Plaintiffs' economic goals; and  
conceived, developed, and actively participated in a complex real  
27 estate development, securities, and economic enterprise. The  
Plaintiffs created the idea for The Ridge at Trinitas, drawings  
for the golf course, financing, issuance of securities for golf  
memberships, and Michael Nemee performed some of the physical  
28 construction of the golf course.

1 to Ray Waller at the Calaveras Building Department. In this letter  
 2 Robert Bliss affirmatively states that the work being done is "more  
 3 of a clearing and brushing project to develop a private golf  
 4 course." Mr. Bliss further states that there are only a small  
 5 amount of cuts and fills to construct greens and tees, isolated to  
 6 only 75 acres within the 400 acres owned by the Plaintiffs.<sup>16</sup>  
 7 Finally, Robert Bliss concludes that a grading plan is not  
 8 warranted because of the "small isolated nature" of the grading  
 9 contained well within the boundaries of the 400 acres. As actual  
 10 events demonstrate, these statements by the Plaintiffs'  
 11 representative are again creatively misleading at best and  
 12 intentionally false at worst.<sup>17</sup>

13 The issue of the alleged violation was dropped due to a  
 14 determination by department heads at the County that the  
 15 represented limited nature of the grading being done on The  
 16 Property, zoned for agriculture, did not require a permit. No  
 17 determination was made or represented that the purpose for which  
 18 the grading was being done was allowable under the Calaveras County  
 19 Zoning Ordinances.

20 ///

21 In July of 2004, the Plaintiffs filed an application with  
 22 Calaveras County for a General Plan Amendment, Zoning Amendment,  
 23 and Tentative Subdivision Tract Map for The Property. In this  
 24 Application the Plaintiffs sought to subdivide the 160-acre parcel

25  
 26 <sup>16</sup> The commercial 18-hole golf course constructed by the  
 Plaintiffs is located on 380 acres of The Property.

27  
 28 <sup>17</sup> Tom Jeffries, the Plaintiffs' agent, repeats these  
 statements in his letter of January 9, 2004, to Ray Waller at the  
 Calaveras County Building Department.

1 of The Property to create twelve 5-acre parcels, one 98.8-acre  
2 parcel, and to do minor grading for house pads and roadways. The  
3 application makes no reference to a golf course, and the attached  
4 maps of the proposed development do not show a golf course on The  
5 Property. Though not shown on the map with this application,  
6 Michael Nemee testified that at the time of making this application  
7 the Plaintiffs actually intended to construct six golf holes for  
8 the homeowners, who they expected to be family members and friends.  
9 This testimony as to only six golf holes is inconsistent with the  
10 drawings and intentions of the Plaintiffs to develop an 18-hole  
11 golf course on The Property. The July 2004 application identifies  
12 Jeffries Engineers and Susan Larson as the Plaintiffs' agents for  
13 this application. By letter dated July 7, 2004, Don Ratzlaff, who  
14 was a Calaveras County Planner II, notified Tom Jeffries of  
15 deficiencies in the application, that it must be amended, and it  
16 will not be processed due to it being incomplete.

17 By August of 2005, Ray Waller, of the Calaveras County  
18 Building Department, communicated in an email his opinion to Robert  
19 Sellman, the then Calaveras County Interim Planning Director, and  
20 other county personnel, that the Plaintiffs could construct a  
21 private golf course on The Property for their personal use and use  
22 of their friends. Mr. Waller makes no reference in his email to  
23 construction of a commercial golf course on The Property, and  
24 expressly states that his personal opinion is limited to a private,  
25 personal-use golf course by owners of The Property. While this was  
26 Ray Waller's opinion, Robert Sellman testified that he disagreed  
27 with Mr. Waller, and that even a private, personal-use golf course  
28 was not permitted on property zoned for agriculture. While

1 Mr. Waller was discussing a private, personal-use golf course with  
2 the Plaintiffs, in a letter to Robert Sellman dated February 7,  
3 2005, the Plaintiffs communicated their larger development plans  
4 for The Property. This larger development included an 18-hole golf  
5 course with 10,000 to 12,000 rounds per year; private golf  
6 tournaments; private golf lessons; two-story, 18,000-square-foot  
7 clubhouse/olive tasting facility; bar and grill; banquet  
8 facilities; sale of golf equipment; 22,000-square-foot lodge with  
9 30 guest rooms; swimming pool; exercise room; spa; and a facility  
10 to be used as dormitory housing for group lessons (also described  
11 as an academy in Michael Nemee's testimony). This was to be  
12 placed on 440 acres of property owned by the Plaintiffs and other  
13 family members.

14  
**15 Loans Obtained by the Plaintiffs From Community  
Bank of San Joaquin**

16 In September of 2002, the Plaintiffs sought and obtained a  
17 loan from Community Bank of San Joaquin (also referenced as  
18 "Bank"). This loan was in the amount of \$370,000.00 and is  
19 evidenced by a Note dated September 9, 2002.<sup>18</sup> The Disbursement  
20 Authorization Request signed by the Plaintiffs, which is included  
21 as part of this loan documentation, states that the primary purpose  
22 of the loan is for "Business (including Real Estate Investment)".  
23 The specific purpose is stated by Plaintiffs in the Disbursement

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24  
25 <sup>18</sup> Exhibit III is the August 13, 2002 County Bank of San  
Joaquin Credit Authorization Memorandum for the Plaintiff's then  
26 existing loan with the Bank. In addressing the purpose of the  
then existing loan in 2002, the Memorandum states, "As mentioned  
27 previously, CBSJ [Bank] provided funds to the Nemee's [sic.] to  
assist with the purchase of the land. The property that was  
28 purchased is to be developed in the next several years into a  
golf course."

1 Authorization Request to be "Refinance of bare land, to be  
2 developed to a golf course." Based on the testimony of Jane  
3 Butterfield, president of Community Bank of San Joaquin, if the  
4 Plaintiffs had been obtaining a personal loan, then it would have  
5 so stated on the Disbursement Authorization Request.

6 Mr. Nemee's testimony at trial was that he had not bothered to  
7 read this part of the note and loan documentation stating that the  
8 purpose of the loan was for business, the development and  
9 construction of a golf course. The court finds that such testimony  
10 is not credible and is inconsistent with the attention to detail  
11 exhibited by Plaintiffs in advancing the development of this  
12 commercial 18-hole golf course, their involvement in the  
13 development of The Property, and Plaintiffs' communications  
14 (directly and by their professionals) made during the ten-year  
15 period from acquisition of The Property through this trial. The  
16 court finds that as early as 2002 the Plaintiffs were obtaining  
17 business loans for construction of a commercial 18-hole golf  
18 course, which was not intended for the personal, private use of the  
19 Plaintiffs.

20 The Plaintiffs obtained a line of credit, their second loan,  
21 dated August 25, 2005 in the amount of a \$500,000.00. The primary  
22 purpose of this loan is stated on the Reimbursement Request and  
23 Authorization signed by the Plaintiffs to be "Business (including  
24 real estate development)," with the specific purpose stated as,  
25 "Capital for construction, and related expenses of Trinitas Golf  
26 course." This credit line was used to repay a \$300,000.00  
27 obligation owed by the Plaintiffs. A third loan obtained by the  
28 Plaintiffs is evidenced by a promissory note dated January 27,

1 2006, in the amount of \$1,300,000.00.<sup>19</sup> This loan was used in part  
2 to pay \$503,477.37 for the obligation owed on the August 22, 2005  
3 credit line. The Disbursement Request and Authorization signed by  
4 the Plaintiffs states that the primary purpose of the loan is  
5 "Business (including Real Estate Investment), and the specific  
6 purpose to "Provide capital for construction, and development  
7 related expenses for Trinitas Golf Course." The \$1,300,000.00 loan  
8 was modified by a change in terms agreement dated December 28,  
9 2006, increasing the loan amount to \$1,600,000.00.<sup>30</sup> The purpose  
10 of the loan continued to be for construction and payment of  
11 development expenses for the Trinitas Golf Course.

12 In the Fall of 2006, before the final loan modification and  
13 \$300,000.00 of additional credit, the Community Bank of San Joaquin  
14 was concerned with the slowness of the Plaintiffs in advancing  
15 their development of The Property and application for the land use  
16 changes with Calaveras County. A meeting was held between Michael  
17 Nemee and Bank representatives on November 9, 2006. Michael Nemee  
18 requested that Stephanie Moreno, the then Community Development  
19 Director for Calaveras County, attend the meeting. While all  
20 parties agree that Ms. Moreno attended the meeting, there are  
21 significantly different versions as to the substance and alleged  
22 purpose of her attendance. Michael Nemee testified that Ms. Moreno  
23 attended the meeting to assist Plaintiffs in getting additional  
24 loans from the Bank and an extension of the due date for the then  
25

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26       <sup>19</sup> Steve Nemee, Michael Nemee's parents, and Patricia Nemee  
27 are added co-borrowers on this note.

28       <sup>30</sup> Steve Nemee and Patricia Nemee signed this extension  
agreement and remain as co-borrowers on the note.

1 existing loan. Further, that Plaintiffs relied upon statements by  
2 Ms. Moreno that their land use application was going to be approved  
3 by the County.

4 From the testimony presented, the court finds that Michael  
5 Nemee invited Ms. Moreno to attend because Plaintiffs thought it  
6 would enhance their ability to convince the Bank to extend the due  
7 date on the loan and give the Plaintiffs the additional credit they  
8 desired. Michael Nemee's testimony and arguments attempt to paint  
9 a picture that but for Ms. Moreno attending the meeting, the  
10 Plaintiffs would not have obtained an additional loan from  
11 Community Bank of San Joaquin in the amount of \$300,000.00.  
12 Therefore, if Plaintiffs had not obtained the loan, they would not  
13 have proceeded with investing millions more in the development of  
14 the golf course. Michael Nemee's testimony at trial was that  
15 through 2006 the Plaintiffs spent \$3,345,390.00 in developing the  
16 golf course on The Property. The court finds that the additional  
17 \$300,000.00 of credit extended following the November 9, 2006  
18 meeting between Michael Nemee and the Bank was not the cause of the  
19 prior and subsequent expenditures of monies by the Plaintiffs in  
20 construction of the golf course and development of The Property.

21 Michael Nemee's testimony and argument stand in stark contrast  
22 to the testimony of Ms. Moreno and the other persons at the  
23 meeting. Robert Puchenelli, then a Business Development Officer  
24 for Community Bank of San Joaquin, attended the November 9, 2006  
25 meeting for the Bank. He testified that the Bank was concerned  
26 about the delays in the project and development of the golf course.  
27 He stated that at the meeting Ms. Moreno described the zoning  
28 application process and what she was doing to keep the application

1 moving. Mr. Puchenelli further testified that the Bank knew in  
 2 2005 that the golf course was under construction, and that doing so  
 3 was unusual because the Plaintiffs did not have the real-property  
 4 entitlements to develop the golf course. Further, Mr. Puchenelli  
 5 and the Bank knew that the Board of Supervisors must approve any  
 6 zoning or land use application for the golf course to be legal, and  
 7 that such a decision did not rest with Ms. Moreno or County staff.  
 8 Mr. Puchenelli's testimony supports this court finding that the  
 9 Plaintiffs knew that they had to obtain approval of their land use  
 10 application from the Board of Supervisors to obtain the  
 11 entitlements for their existing and future development and use of  
 12 the 18-hole golf course to be legal under the Calaveras County  
 13 Zoning Ordinances.<sup>31</sup>

14 Robert Daneke, who was employed at Community Bank of San  
 15 Joaquin in 2006, testified that he also attended the November 9,  
 16 2006 meeting with Mr. Nemee, other bank representatives, and  
 17 Ms. Moreno.<sup>32</sup> At the time of the meeting the Plaintiffs had already  
 18 borrowed \$850,000.00 and were seeking an additional \$300,000.00.  
 19 Mr. Daneke's testimony was that Ms. Moreno provided background

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20

21       <sup>31</sup> The Plaintiffs assert that Ms. Moreno said that her  
 22 predecessor had mishandled the processing of the Plaintiffs' land  
 23 use application and that the County faced legal exposure for it.  
 24 In addition to this contention being in dispute, it has no  
 25 bearing on the Plaintiffs acquiring loans and developing the golf  
 26 course before they obtained a changing for the zoning on The  
 27 Property. Additionally, there is testimony that the potential  
 28 "legal exposure" could have been in connection with an EIR not  
 being adequately prepared to sustain a legal challenge if raised  
 by members of the public, not exposure to the Plaintiffs.

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27       <sup>32</sup> Mr. Puchenelli and Mr. Dandke were presented as  
 28 witnesses by the Plaintiffs. Jane Butterfield, the president of  
 Community Bank of San Joaquin, was called by the County as a  
 witness.

1 about the application process and that she believed that the EIR  
2 would be processed in a timely manner. Mr. Daneke confirmed that  
3 based on their discussions, he and everyone at the meeting,  
4 including Michael Nemee, knew that the Board of Supervisors had to  
5 approve the application and that the application had not yet been  
6 approved.

7 An excerpt from a Credit Authorization Memorandum for  
8 Community Bank of San Joaquin prepared by Mr. Daneke was introduced  
9 by the Plaintiffs as Exhibit 38. The County introduced as Exhibit  
10 KKK a complete copy of the Bank's Credit Authorization Memorandum  
11 dated December 14, 2006. This Credit Authorization Memorandum is  
12 a document maintained by the Bank in its ordinary course of  
13 business, with additions made over time by the credit officers, and  
14 contains a history of information provided to the Bank concerning  
15 the Plaintiffs' loan transaction. The Credit Authorization  
16 Memorandum, and as confirmed by Mr. Daneke, documents that the Bank  
17 proceeded with the loan under the belief that the golf course being  
18 developed by the Plaintiffs was illegal absent the zoning  
19 application being approved by the Board of Supervisors. The  
20 granting of a further loan was based on the then existing value of  
21 The Property, not the value based on there being a legal golf  
22 course constructed on The Property. Finally, the Bank acknowledged  
23 that the Plaintiffs proceeding with the development of the golf  
24 course before obtaining approval of the land use application was  
25 unusual for this type of loan, and the illegal construction was a  
26 "key risk" for the Bank.

27 Jane Butterfield, President of Community Bank of San Joaquin,  
28 testified as to the Bank's dealing with the Plaintiffs following

1 the November 9, 2006 meeting. Though not present at the meeting,  
2 Ms. Butterfield reviewed the Credit Authorization Memorandum  
3 because the amount of credit exceeded the lending limit of the loan  
4 officer. From her testimony and other evidence, the court finds  
5 that as of the November 9, 2006 meeting the Bank was developing an  
6 exit strategy from this loan, other than a bank liquidation of The  
7 Property. The Bank was not going to finance the entire development  
8 project, but believed that once the EIR was completed, a larger  
9 lender would provide sufficient financing for the project, pay off  
10 the Bank's loan, and carry the development though the final map  
11 with the County.

12 From the evidence present, the court finds that Ms. Moreno did  
13 not represent to anyone at the November 9, 2006 meeting, or anytime  
14 prior to or thereafter, that the Plaintiffs' zoning and land use  
15 application would be approved by the Board of Supervisors.  
16 Further, everyone involved in the meeting with the Bank, including  
17 the Plaintiffs, clearly understood that the necessary land use  
18 application had to be approved by the Board of Supervisors, not  
19 Ms. Moreno. Neither the Plaintiffs nor the Community Bank of San  
20 Joaquin relied upon any representations by Ms. Moreno, or any other  
21 representative of the County, as to the ultimate approval of the  
22 application in proceeding with any additional loans or further  
23 development of The Property. The court does not find credible the  
24 Plaintiffs contention or testimony asserting that Plaintiffs relied  
25 on Ms. Moreno's or other County representatives' advice or  
26 recommendations in obtaining any additional financing or proceeding  
27 with their development of The Property.

28 At trial much was made by the Plaintiffs that they did not

1 feel Ms. Moreno's predecessor as Community Development Director  
2 supported the project and had taken an adversarial position to  
3 their development of The Property. While trying to place blame and  
4 question the conduct of others, the Plaintiffs do not provide  
5 sufficient evidence of any improper conduct of County  
6 representatives or reliance on representations by county  
7 representatives in proceeding with the golf course and development  
8 of The Property. The court finds that any of the complained of  
9 hostility and difficulty asserted by Plaintiffs is not out of the  
10 ordinary for someone attempting to obtain a significant land-use  
11 change. The Plaintiffs have not shown that they were deprived of  
12 the opportunity to properly and fairly present the requested land-  
13 use change to the Board of Supervisors.

14 The Plaintiffs also complain about the work done by Keith  
15 Dunbar, who was hired by the County to prepare an EIR the  
16 Plaintiffs' land-use application,<sup>33</sup> and the termination of  
17 Mr. Dunbar by the County. Plaintiffs' complaints about the  
18 termination of Mr. Dunbar as the consultant for the County and that  
19 Mr. Dunbar had been paid some fees do not establish a basis for  
20 finding improper conduct by the County. The County terminated  
21 Mr. Dunbar when it was concluded that he was not making sufficient  
22 progress in preparing the EIR, that the work product consisted of  
23 little more than generic boilerplate EIR text, and that the product  
24 was not sufficient to warrant further payment to Mr. Dunbar.  
25 Additionally, in his testimony, Michael Nemee neglected to disclose

27       <sup>33</sup> Though employed by the County, Mr. Dunbar's fees were  
28 paid from monies that the Plaintiffs were required to deposit  
with the County as a condition of processing the land use  
application.

1 that upon termination of Mr. Dunbar, the County returned to  
2 Plaintiffs the \$30,000.00 balance of the Plaintiffs' deposit for  
3 Mr. Dunbar's fees held by the County.

4       Though on a professional level the communication concerning  
5 the termination of Mr. Dunbar could have been better managed  
6 between the County and the Plaintiffs, it does not support a  
7 finding that the County acted improperly. The fact that a  
8 professional is paid a portion of the fees before the client  
9 ascertains that the product is inadequate is not unusual. The  
10 contract between the County and Mr. Dunbar for the preparation of  
11 the EIR documents provided that payments would be made before the  
12 draft administrative EIR would be presented to the County. There  
13 is nothing unusual about paying a professional as they are doing  
14 the work to develop a draft for a client. As discussed in this  
15 decision, what the Plaintiffs describe as an adversarial  
16 relationship with the County may well have arisen from the friction  
17 which is created by their business strategy to develop a golf  
18 course not permitted by the Zoning Ordinances. The "build it first  
19 and then seek approval after the fact" approach generated a number  
20 of complaints and otherwise unnecessary issues for the County and  
21 Plaintiffs to address with respect to The Property and the  
22 development the Plaintiffs desired.

23 **Real and Personal Property Taxes**

24       The Plaintiffs also contend that increases in the real and  
25 personal property taxes relating to the development and operation  
26 of a commercial 18-hole golf course on The Property is evidence  
27 that the County was responsible for the Plaintiffs proceeding with,  
28 or that the County approved, the construction of the golf course.

1 The assessed values of the real and personal property used by  
2 Calaveras County to increase or decrease property taxes were based  
3 upon the information provided to the county assessor by the  
4 Plaintiffs themselves. As the Plaintiffs made substantial  
5 improvements to the real property through the golf course  
6 construction, they reported those improvements to the County  
7 Assessor. The Assessor then valued The Property based upon such  
8 information. The assessed value was then used by other officials  
9 to compute and collect the taxes. Subsequently, in 2008 the  
10 Plaintiffs sought a reassessment of the real property value based  
11 upon the County asserting that the development of the golf course  
12 was illegal. The real property taxes were reduced by the County.

13 Personal property used in the operation of the golf course was  
14 also taxed by Calaveras County based on personal-property business  
15 assets being reported to the Assessor by the Plaintiffs. Whether  
16 or not the business assets are put into active service by the  
17 owner, they are taxed by the County.<sup>34</sup> Again, the Plaintiffs  
18 advised the County of events which triggered the assessment, and  
19 the increase in value based on the reported information then  
20 resulted in the tax collector seeking payment of higher real and  
21 personal property taxes.

22 The reassessment of The Property and the tax statements  
23 generated by the County were not dependent upon a determination  
24 that the operation of a commercial golf course by the Plaintiffs  
25 was legal, but based upon information provided to the County by the  
26  
27

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28 <sup>34</sup> Cal. Rev. & Tax. Code § 30800 et. seq.

1 Plaintiffs.<sup>35</sup> No law or facts have been shown that the assessor or  
 2 tax collector determine zoning compliance and legal uses of land  
 3 under the Calaveras County Zoning Ordinances.

4 **Sophistication of the Plaintiffs**

5 As an undercurrent to the arguments presented by Plaintiffs,  
 6 a theme is developed that Plaintiffs are simple folk and relied  
 7 upon the advice of County representatives to embark on this multi-  
 8 million dollar development of The Property. By the Plaintiffs  
 9 accounting, they have expended \$7,093,517.00 through 2009 in  
 10 developing The Property for the commercial 18-hole golf course.  
 11 The monies expended are broken down in the following annual  
 12 amounts:<sup>36</sup>

13	2004	\$ 563,302
14	2005	\$1,753,027
15	2006	\$1,029,061
16	2007	\$2,128,760
17	2008	\$1,089,570
18	2009	\$ 529,797

19 ///

20 The court does not find the testimony and arguments presented  
 21 by the Plaintiffs that they relied upon the advice and direction of  
 22 County representative to be either credible or plausible. The  
 23 court finds that the Plaintiffs were and are sophisticated business  
 24 persons who hired professionals to represent them in the

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25 <sup>35</sup> Even to the extent that the Plaintiffs could show that  
 26 the Assessor thought that he or she was valuing The Property for  
 27 a golf course properly built on the property zoned for  
 agriculture, "payment of taxes on an illegal structure does not  
 prove that upon payment of taxes the structure becomes legal or  
 that the illegality of the structure renders the entity immune  
 from taxation." *Golden Gate Water Ski Club v. County of Contra  
 Costa*, 165 Cal. App. 4th 249, 258 (2008).

28 <sup>36</sup> Pls.' Ex. 48.

1 development and marketing of their destination golf resort,  
2 Trinitas. The Plaintiffs chose and were actively represented by  
3 land-use and engineering professionals throughout the development  
4 of The Property and land use application process. The Plaintiffs  
5 did not rely upon advice and direction from the County in making  
6 their land use and business decisions, but relied upon the advice  
7 and counsel of their professionals and their own business judgment.  
8 This development of The Property and creation of a private  
9 membership golf club for the commercial 18-hole golf course was a  
10 complex real estate, land use, and business transaction. In  
11 addition to the land use and engineering professionals, the  
12 Plaintiffs engaged counsel to obtain approval from the State to  
13 sell securities for membership in the golf club for the commercial  
14 18-hole golf course.

15 Further, the Plaintiffs and their professionals clearly knew  
16 that it was the Board of Supervisors who must approve, by a  
17 majority vote, the application for the land-use changes. When that  
18 failed, the Plaintiffs and their professionals knew that the Board  
19 of Supervisors must determine, by a majority vote, an appeal of the  
20 Planning Commission determination that golf course was not  
21 Agritourism under the Calaveras County Zoning Ordinances. The  
22 Plaintiffs did not rely on County representatives in development of  
23 The Property, their strategy for developing The Property under the  
24 existing Zoning Ordinances, or advocating the land use application  
25 before the Board of Supervisors. The strategy of how, what, and  
26 when to present matters to the Board of Supervisors was developed  
27 and adopted by the Plaintiffs with the advice and direction of the  
28 professionals they hired to achieve their economic goals for The

## 1 | Property.

The court finds that construction of the golf course and development of The Property by the Plaintiffs was not done based upon being misled by representatives of the County or a misunderstanding of the law, but as part of a calculated business strategy of the Plaintiffs. At the heart of this strategy is a "it is better to seek forgiveness than to get permission" approach to land use and real estate development.<sup>37</sup> This strategy for development and use of The Property was first demonstrated when Plaintiffs acquired The Property and set out to remodel a barn into a residence. It was not until the County code officers contacted the Plaintiffs about work having been done on the barn without permits that the Plaintiffs undertook an after-the-fact documentation of the construction. The action by which they sought forgiveness for having done the remodeling without permits was to provide the County with letters represented to be from licensed contractors verifying the work they had done on the barn.<sup>38</sup> This act-first-and-then-deal-later-with-the-problems approach permeates

<sup>37</sup> This phrase and aggressive approach to achieving results is attributed to Rear Admiral Grace Hopper, USN.

22       <sup>38</sup> Even this simple process was not without controversy  
23 between the Plaintiffs and the County. Two licensed contractors  
24 provided written confirmations of the work previously done on The  
25 Property. One letter was provided for the electrical work (with  
26 Michael Nemee's father being the certifying licensed electrical  
27 contractor) and the other for plumbing work (with an unrelated  
28 contractor providing the plumbing certification) done in  
remodeling the barn. When verifying the written confirmations  
delivered to the County by Michael Nemee, the County's  
investigation disclosed that the plumber denied having provided a  
written confirmation to Michael Neeme for presentation to the  
County. The plumber did confirm for the County representative  
that he had done the plumbing work for Michael Nemee.

1 the Plaintiffs' conduct in the matters before the court.

2

3                   **EXPERT WITNESS TESTIMONY CONCERNING**  
4                   **CALAVERAS COUNTY AGRITOURISM ZONING ORDINANCE**

5                  The court is required to determine the meaning of the term  
6 "Agritourism" as it is used in the Calaveras County Zoning  
7 Ordinances as amended in 2005. To assist the court, both parties  
8 have presented expert and percipient witnesses concerning the  
9 adoption of the 2005 amendments to the Zoning Ordinances by the  
10 Calaveras County Board of Supervisors. The Property at issue in  
11 this case was and is zoned either Agriculture Preserve (AP) or  
12 General Agriculture (A-1). In addition to reviewing the Zoning  
13 Ordinances, the court has been presented with a determination by  
14 the Calaveras County Board of Supervisors that a commercial golf  
15 course is not Agritourism under the Calaveras County Zoning  
Ordinances.

16                 Testimony by experts is governed by Fed. R. Evid. 702, which  
17 limits such testimony to "scientific, technical, or other  
18 specialized knowledge [which] will assist the trier of fact to  
19 understand the evidence or determine a fact in issue . . ." The  
20 expert testimony in this case has been considered by the court  
21 consistent with the strictures of Fed. R. Evid. 702.

22                 ///

23                 David Zilberman, Ph.D., testified for the Plaintiffs  
24 concerning his interpretation of agriculture and agritourism, as  
25 those terms are used in the 21<sup>st</sup> Century. Dr. Zilberman's  
26 credentials were presented in the record and he approached this  
27 issue as an economist. He advocates the court adopt an expansive  
28 definition of the terms agriculture and agritourism as any use of

1 the land that produces something of economic utility. Though a  
2 golf course does not produce something which is harvested for food,  
3 clothing, fuel, building materials, aesthetics, or other on- or  
4 off-property use, the ground is used to grow products (grass,  
5 trees, plants) and utilize resources (waterways, features of the  
6 land) for reusable use by consumers (the golfers). It is his  
7 opinion that utility derived from the agricultural activity, not  
8 the mere destruction or consumption of an agricultural product,  
9 should be the basis of the court's interpretation of the Zoning  
10 Ordinances. From the perspective of an economist, Dr. Zilberman  
11 concludes that a golf course represents one of the highest and best  
12 uses of agricultural property, and therefore a golf course is  
13 agriculture and Agritourism.

14 The materials presented by Dr. Zilberman as part of his  
15 testimony include an analysis which monetizes the value for the use  
16 of the agricultural land on a per acre foot of water consumed and  
17 per acre of land basis. This data<sup>39</sup> includes the following  
18 information for the court:

19 | //

Agricultural Commodity	Revenues (Product Value) \$1,000	Revenues per Unit of Water \$/acre foot	Revenues per Unit of Land \$/acre
Grains	\$113,621	\$79	\$204
Rice	\$231,001	\$72	\$422
Cotton and Cottonseed	\$1,025,523	\$367	\$1,122

27                   <sup>39</sup> Cited Source: Hawkins, Tom. 2009. Agricultural Water  
28 Use Collection Program. Department of Water Resources, State of  
California, Sacramento SC, June 9.

1	Sugar Beets	\$111,835	\$309	\$1,196
2	Corn	\$157,985	\$89	\$610
3	Beans, Dry	\$56,700	\$205	\$506
4	Tomatoes, Processing	\$617,190	\$742	\$2,277
5	Tomatoes, Fresh Market	\$333,840	\$2,840	\$7,800
6	Cucubits	\$382,549	\$1,535	\$4,096
7	Garlic and Onions	\$443,047	\$1,711	\$5,001
8	Potatoes	\$271,613	\$2,479	\$5,154
9	Other Truck Crops	\$8,607,152	\$5,724	\$9,429
10	Almonds and Pistachios	\$919,789	\$376	\$1,601
11	Other Deciduous Nuts and Fruits	\$1,308,940	\$571	\$2,294
12	Subtropical Crops	\$1,103,130	\$752	\$2,948
13	Grapes, All	\$2,836,313	\$1,661	\$3,430
14	Alfalfa and other Sources of Hay	\$730,422	\$127	\$477
15	Safflower and Other Field Crops	\$552,892	\$131	\$584
16				
17	All Crops	\$19,903,533	\$645	\$2,264
18	Golf Courses	\$1,744,839	\$5,126	\$14,431

From an economist's perspective, this chart demonstrates that the use of agricultural property for a golf course is substantially more valuable in the revenues per acre golf produces than other traditional agricultural activities. On an average basis for all crops, golf produces 795% more value per acre foot of water and

1 637% more value per acre of land. When compared to a subset of the  
2 five highest revenue crops, on average golf produces 727% more  
3 value per acre foot of water and 366% more value per acre of land.<sup>40</sup>

4 In his testimony Dr. Zilberman acknowledged that he did not  
5 review the Calaveras County Zoning Ordinances at issue, nor was he  
6 providing testimony as to any specific zoning code. His testimony  
7 was as an economist concerning the most productive use of  
8 agricultural property. Additionally, his testimony does not take  
9 into account the societal, political, and non-economic  
10 considerations underlying Zoning Ordinances in general and the  
11 specific ordinances at issue for Calaveras County in this case.

12 For the Defendant, Thomas Jacobson testified as an expert  
13 witness. Mr. Jacobson's qualifications were presented in the  
14 record. His testimony addressed the Calaveras County Zoning  
15 Ordinances at issue and he opined that the County was reasonable in  
16 determining that the Plaintiffs' golf course was not Agritourism as  
17 that term is used in the Calaveras Zoning Ordinances. His  
18 testimony focused on the interpretation of the examples provided in  
19 the Ordinance, which he found to indicate an intention of the Board  
20 of Supervisors to limit Agritourism to uses which did not require  
21 any significant change to the land from its traditional  
22 agricultural uses. In coming to his conclusions, Mr. Jacobson  
23 considered the hearings conducted by the Board of Supervisors in  
24

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25 <sup>40</sup> The five largest revenue crops in the study are Other  
26 Truck Crops, Almonds and Pistachios, Other Deciduous Nuts and  
27 Fruits, Subtropical Crops, and Grapes. This represents 74% of  
the total crop revenue and excludes some of the outlying low-per-  
dollar-per-acre crops.

1 adopting the 2005 amendments to the Zoning Ordinances, the 2009  
2 hearing denying the Plaintiffs' appeal of the Calaveras County  
3 Planning Department, and the Planning Commission rulings that the  
4 golf course was not Agritourism.

5       The third witness, Kenneth Churches, the former UC Davis  
6 Cooperative Extension Branch in Agriculture Farm Advisor for  
7 Calaveras County, was presented as an expert and percipient witness  
8 to the 2005 amendments to the Zoning Ordinances. Mr. Churches  
9 participated with a group called the Ag-Coalition, which was the  
10 sponsor and drafter of proposed zoning ordinance amendments which  
11 were presented to the County and ultimately led to the 2005  
12 amendments. The members of the Ag-Coalition met with members of  
13 the Planning Department, including Robert Sellman, Supervisors, and  
14 other members of the public.

15       Mr. Churches expressed his opinion that Agritourism is a type  
16 of rural tourism which is intended to enhance and promote the  
17 economic viability of more traditional agricultural endeavors. The  
18 Ag-Coalition was formed to update the Zoning Ordinances to allow  
19 activities on property zoned for agriculture which are consistent  
20 with agricultural uses and improve the economics of such  
21 agricultural properties. The Ag-Coalition drafted the language  
22 which was ultimately enacted by the Board of Supervisors without  
23 any substantial change. Mr. Churches testimony is that the Ag-  
24 Coalition intentionally drafted the proposed definition of  
25 Agritourism in open-ended, nonspecific terms, and did not provide  
26 enumerated permitted uses, as is done in the other provisions of  
27 the Zoning Ordinances, to allow for future changes in Agritourism  
28 uses without having to amend the Zoning Ordinances. Such non-

1 identified uses would be dependant upon subsequent interpretations  
2 of the Zoning Ordinances, though Mr. Churches did not state whom he  
3 though would be responsible for such determinations.

4       The draft language prepared by the Ag-Coalition included a  
5 series of nonexclusive examples of Agritourism. These examples  
6 were included in the Zoning Ordinance ultimately enacted by the  
7 Board of Supervisors. Notwithstanding these examples, Mr. Churches  
8 asserts that so long as there is some form of agricultural activity  
9 on a property, the owner could engage in any other activity as a  
10 form of Agritourism to help make agricultural property more  
11 economically viable. Additionally, Mr. Churches testified that  
12 Michael Nemee was involved with the Ag-Coalition when the 2005  
13 zoning amendments were being advanced, he did not recall Michael  
14 Nemee ever asserting that golf was Agritourism. With respect to  
15 golf courses, Mr. Churches testified that while it was discussed,  
16 it was not included on the descriptive list to be stated in the  
17 ordinance, nor was it expressly excluded from the definition of  
18 Agritourism.

19       Finally, Robert Sellman, the Calaveras County Planning  
20 Director when the 2005 amendments were adopted, testified as to his  
21 participation in the process on behalf of the County. Mr. Sellman  
22 testified that he affirmatively told the Ag-Coalition that golf was  
23 not considered to be Agritourism, though there is not a reference  
24 to this exclusion in the written record. Further, he directs the  
25 court to the negative declaration and environmental documents  
26 relating to the Board of Supervisors amending the Zoning Ordinances  
27 in 2005 which make no reference to a golf course. This negative  
28 declaration states that the changes to the Zoning Ordinances in

1 2005 would not cause a significant effect on the environment.  
2 Given the nature of the other examples, allowing a use which so  
3 dramatically changes and develops agricultural property into a golf  
4 course, Mr. Sellman testified that a negative declaration of the  
5 environmental impacts would not be sufficient. Mr. Sellman was  
6 clear in his testimony that while the Ag-Coalition drafted proposed  
7 amendments to the Zoning Ordinances, these were delivered to the  
8 Calaveras County Planning Department which prepared the actual  
9 amendments and supporting documents which were considered by the  
10 Board of Supervisors.

11 The testimony and evidence presented leads to the court making  
12 a number of findings. First, the Ag-Coalition, as the sponsor of  
13 the 2005 amendments, intentionally drafted and proposed a  
14 definition of Agritourism in a manner to leave open and uncertain  
15 what actual economic activities the Board of Supervisors intended  
16 to constitute Agritourism. This stands in contrast to other  
17 provisions in the Calaveras County Zoning Ordinances which permits  
18 specific activities. In doing so the Ag-Coalition was insuring  
19 that future disputes would arise as to what is permitted and that  
20 some governmental body would have to make the ultimate  
21 determination. No governmental body at the County, other than the  
22 Board of Supervisors, is identified to make the determination as to  
23 what is included in the term Agritourism. While creating an  
24 opportunity to have theretofore uncontemplated uses subsequently  
25 determined to be Agritourism, the proponents of this nonspecific  
26 definition also insured that there was a risk that some activities  
27 would not be within their unstated intentions of what should be  
28 Agritourism. Secondly, the Calaveras County Board of Supervisors

1 enacted the 2005 amendments after having the language prepared by  
2 the Planning Department and receiving extensive documentation from  
3 County staff. While the personal opinion of Mr. Churches as to  
4 what he intended, but did not specify in the draft language, when  
5 submitting it to the Planning Department gives the court an insight  
6 to the agricultural business interests which were being advanced,  
7 it does not provide substantial assistance to determining the  
8 intent of the Board of Supervisors.

9       Third, the Plaintiffs embrace Dr. Zilberman's opinion that  
10 agricultural land should be put to the most profitable use without  
11 regard to traditional definitions and concepts of agriculture.  
12 Dr. Zilberman was clear in this testimony that he envisioned an  
13 economic-use policy which allowed the land owner to use it for the  
14 most profitable purpose possible. This did not attempt to take  
15 into account theoretical or actual Calaveras County land-use  
16 policies, zoning issues and general-welfare policies.

**INTERPRETATION OF THE CALAVERAS COUNTY  
ORDINANCES FOR PROPERTIES ZONED  
AGRICULTURE PRESERVE AND GENERAL AGRICULTURE**

19       The County has argued that because the Board of Supervisors  
20 determined that a commercial golf course is not Agritourism, the  
21 only role for the court is to defer to that decision, so long as  
22 the process by which it was made was procedurally proper. This  
23 contention is incorrect. The California Supreme Court has  
24 established the court's role in considering land-use zoning  
25 ordinances and their proper application. The rules of statutory  
26 construction are applicable to zoning ordinances in the same manner  
27 as they are to statutes. *Professional Engineers in California*  
28 *Government v. Kempton*, 40 Cal. 4th 1016, 1037 (2007); *Stolman v.*

1 City of Los Angeles, 114 Cal. App. 4th 916, 923-924 (2003). To  
2 determine the intent of the statute or ordinance, the court looks  
3 first to the plain language and ordinary meaning of the words used.  
4 The words are read in context of the ordinance, considering the  
5 nature and purpose of the enactment. If the language is clear,  
6 then no further interpretation of the statute is necessary. If the  
7 language is ambiguous, then the court considers extrinsic evidence,  
8 *Kempton*, 40 Cal. 4th at 1037, which includes the legislative  
9 history, public policy, and the statutory scheme of which the  
10 statute is a part. Finally, if after reviewing the plain language  
11 and extrinsic aids the meaning of the statute remains unclear, the  
12 court, proceeding cautiously, applies reason, practicality, and  
13 common sense to the statute. *Woodland Park v. City of East Palo*  
14 *Alto Rent Stabilization Board*, 181 Cal. App. 4th 915, 920 (2010).

15 Ordinarily, questions of law such as interpretation of an  
16 ordinance are subject to *de novo* review by the court. *Stolman*, 114  
17 Cal. App. 4th at 927-928. The court may consider the zoning  
18 administrator's interpretation, but is not bound by it. *Id.*  
19 Another District Court of Appeal panel expanded this concept,  
20 finding that the court should accord great weight to the  
21 contemporaneous administrative interpretation given to a statute  
22 unless that interpretation is palpably erroneous. "Where the  
23 administrative agency interpreting the statute 'has special  
24 expertise and its decision is carefully considered by senior agency  
25 officials, that decision is entitled to correspondingly greater  
26 weight.'" *McKell v. Washington Mutual, Inc.*, 142 Cal. App. 4th  
27 1457, 1479 (2006), (internal citation omitted). While the court  
28 has the ultimate responsibility for the construction of a statute,

1 great weight and respect is given to administrative construction of  
2 the statute. *Yamaha Corp. of America v. State Board of*  
3 *Equalization*, 19 Cal. 4th 1, 12 (1998); *Sharon S v. Superior Court*,  
4 31 Cal. 4th 417, 436 (2003).<sup>41</sup> When assessing a nonjudicial  
5 interpretation of a statute or ordinance, the court must consider  
6 a complex set of factors material to the legal issue before it.  
7 The court begins with the assumption that the agency has expertise  
8 and technical knowledge concerning the matter, especially if it is  
9 technical, obscured, complex, open ended, or entwined with issues  
10 of fact, policy, and discretion. Additionally, the court will give  
11 deference to an interpretation by senior officials made after  
12 public notice, that evidences a consistently made interpretation,  
13 which is made contemporaneous with the enactment of the statute.  
14 *Yamaha Corp.*, 19 Cal. 4th at 13.

15 The County provided the transcript from the public hearing on  
16 the Plaintiffs' appeal of the Planning Department determination  
17 that the commercial 18-hole golf course on The Property was not  
18 Agritourism as that term is used in the Calaveras Zoning  
19 Ordinances. The County argues that the court should give great  
20 deference to this decision, based upon the specialized knowledge of  
21 the Planning Department, the public consideration of the issue, and  
22 a consideration of the broad land use policies. However, this  
23 court also considers that this decision was not made

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25 <sup>41</sup> See also *Evans v. Unemployment Insurance Appeals Board*,  
26 39 Cal. 3d 398, 407 (1985), and *Employment Development Department*  
27 *v. California Unemployment Insurance Appeals Board*, 190 Cal. App.  
4th 178, 179 (2010) (nonjudicial interpretations must be rejected  
when they are contrary to statutory intent or incorrect).

1 contemporaneous with the enactment of the Zoning Ordinances, and in  
2 fact was made in light of pending litigation on the issue commenced  
3 by the Plaintiffs against the County. As opposed to the more  
4 normal situation where a landowner approaches the Board of  
5 Supervisors with a proposed prospective future use of real  
6 property, the Plaintiffs were already millions of dollars into the  
7 development of the golf course (though not the lodge and other  
8 amenities they envision for The Property) and were engaged in  
9 litigation to enforce alleged rights against the County. To give  
10 great deference to the County in this situation would effectively  
11 be turning over the resolution of a then ongoing judicial  
12 proceeding to one of the adversary parties.

13 Notwithstanding the pending issues which preclude giving great  
14 deference to and adopting the interpretation of the County on the  
15 meaning of the zoning ordinance, the court determines that the  
16 interpretation by the Board of Supervisors is correct—the  
17 commercial golf course is not Agritourism as defined under the  
18 Calaveras County Zoning Ordinances. The court reaches this  
19 conclusion based on its own interpretation of the ordinance as set  
20 forth in this decision.

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1      **Meaning of Agritourism under Calaveras County Zoning Ordinances**

2            The Calaveras County Zoning Ordinances are set upon a  
 3 foundation that no building or structure shall be constructed, nor  
 4 any land use commenced, enlarged, or altered unless it is permitted  
 5 in, and meets the requirements of, the zone in which the land is  
 6 located.<sup>42</sup> This is a permitted-use structure of zoning ordinances  
 7 in which the County specifies the allowed uses of real property.  
 8 This is contrasted to a statutory scheme in which any and all  
 9 activities are permitted unless expressly prohibited.

10          The Plaintiffs argue, though not pled in the Second Amended  
 11 Complaint, that a golf course is an Agricultural Operation as  
 12 defined by the Calaveras County Zoning Ordinances,<sup>43</sup> and therefore  
 13 the court does not need to consider whether it is Agritourism. The  
 14 court rejects this argument for several reasons. First, the  
 15 Ordinance is clear that Agricultural Operation relates to the  
 16 growing, harvesting, and sale of plants, food, and fiber crops, and  
 17 livestock. Calaveras County, Cal., Code § 17.06.0132. The other  
 18 activities described relate to or are consistent with serving such  
 19 growing, harvesting, and sale activities. The preparation of the  
 20 land, including land leveling and clearing, is for this  
 21 agricultural purpose, and not as the Plaintiffs have argued, any  
 22 and all land-leveling or clearing for whatever purpose. Range  
 23 management practices relate to improving real property in its  
 24 natural condition, not completely remaking it at multi-millions of  
 25 dollars of expense. Second, merely because something may have to

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27          <sup>42</sup> Calaveras County, Cal., Code § 17.04.010.

28          <sup>43</sup> Calaveras County, Cal., Code § 17.06.0132

1 do with plants or animals does not mean that it is permitted in  
2 either Agricultural Preserve or General Agriculture zoned  
3 properties. Focusing on whether something involves plants or  
4 animals is merely the beginning of the analysis of whether it is  
5 permitted under the Zoning Ordinances.

6 Third, the Board of Supervisors has specifically identified  
7 livestock and ranching activities on property zoned for  
8 agriculture. These activities are consistent with the common  
9 definition of agriculture which goes with using the land for the  
10 harvesting and sale of plants, food, and fiber crops, or the  
11 raising, production, and sale of livestock. The court does not  
12 find persuasive Plaintiffs' contention that since they grow olives  
13 on The Property, then whatever other use they make of The Property,  
14 such as building a multi-million-dollar golf course is an  
15 agricultural activity.

16 Fourth, permitted "customary uses clearly incidental and  
17 secondary to the agricultural operation" on property zoned for  
18 agriculture do not include golf.<sup>44</sup> No showing has been made that  
19 the multi-million-dollar golf course developed on The Property is  
20 an activity which is a (1) customary use of agricultural property,  
21 and (2) which is incidental and secondary to the olive orchard on  
22 The Property. To the contrary, the expert witnesses presented by  
23 the Plaintiffs provided clear testimony that golf is not a  
24 customary agricultural use of property. Rather, they argued that  
25 golf should be a future best economic use of agricultural property.  
26 Additionally, as Dr. Zilberman testified for the Plaintiffs, golf  
27

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28 <sup>44</sup> Calaveras County, Cal. Code § 17.06.0132 ¶G

1 course use of property produces dramatically higher economic  
2 returns than the traditional harvesting and sale of plants, food,  
3 and fiber crops. Golf is not incidental and secondary to such use  
4 of The Property, but becomes the primary and dominant use of The  
5 Property.

6 Finally, the court does not find the Plaintiff's contention  
7 that the provision in § 17.06.0132, ¶G stating that "the foregoing  
8 definition of Agricultural Operation shall be broadly construed  
9 unless limited by the strict provisions of the specific uses listed  
10 as permitted uses" means that golf, or any other activity is an  
11 "Agricultural Operation" so long as it involves the land and a  
12 plant. The "broadly construed" direction is within the scope of  
13 the definitions within this section and the Zoning Ordinances.  
14 These sections are clear that they relate to the land being used  
15 for the harvesting and sale of plants, food, and fiber crops, or  
16 the raising, production, and sale of livestock. The Plaintiffs'  
17 argument that so long as they grow something on the land, then it  
18 is an agricultural activity and then they can do whatever such  
19 activity they want is incorrect.

20 As a separate and independent ground in denying this  
21 contention, the Plaintiffs did not raise this claim that golf is a  
22 free standing Agricultural Operation on The Property until the  
23 trial. This Adversary Proceeding had been pending in this court  
24 for twenty-two months, and even longer in state court before it was  
25 removed to this court. In addition to failing on the merits, the  
26 Plaintiffs cannot engage in a trial-by-ambush strategy. Even if  
27 the court were not to determine that a golf course was not an  
28 Agricultural Operation, it would not be a basis for the Plaintiffs

1 to prevail in this litigation by raising this new contention at the  
2 start of the trial.<sup>45</sup>

3 **Permitted Agriculture Zone Uses**

4 In establishing the Agriculture Preserve and General  
5 Agriculture Zoning Ordinances, the Board of Supervisors states the  
6 general purposes underlying each of these Ordinances. Property  
7 zoned General Agriculture (A1) is to be the main resource  
8 production zone in the County.<sup>46</sup> The Zoning Ordinance classifies  
9 these areas for general farming and ranching practices, with such  
10 as the primary emphasis for these properties. Residential uses are  
11 placed in a position of secondary importance when compared to the  
12 commercial scale production of food and fiber. Property zoned  
13 Agricultural Preserve (AP) is to protect and preserve lands for  
14 intensive agriculture and ranching production.<sup>47</sup> The Agriculture  
15 Preserve property may also be utilized for open-space protection  
16 and preservation, with the County stating that the enumerated uses  
17 in the Zoning Ordinances are consisted with the Williamson Act.

18 The Calaveras Zoning Ordinances are express in both nature and  
19 scope of the activities permitted on property zoned for  
20 agriculture.<sup>48</sup> The activities described are traditional  
21 agricultural activities by which the owner uses the land for the  
22 harvesting and sale of plants, food, and fiber crops, or the

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24       <sup>45</sup> The County timely objected to the Plaintiffs attempting  
to raise other claims at the time of trial.

25       <sup>46</sup> Calaveras County, Cal., Code § 17.16.010.

26       <sup>47</sup> Calaveras County. Cal., Code § 17.18.010

27       <sup>48</sup> *Id.* § 17.18.020 (AP permitted uses), § 17.18.021 (AP  
28 conditional uses), § 17.16.020 (A1 permitted uses), and  
§ 17.16.021 (A1 conditional uses).

1 raising, production, and sale of livestock. Express provisions are  
2 made for permitted nontraditional agricultural activities such as  
3 a residential care facility (six or fewer clients), private  
4 equestrian facility (1 to 15 clients), contractor base/yard, rural  
5 veterinary clinic, veterinary clinic, child day care (12 or fewer  
6 children), medical services/rural home doctor offices, heliport,  
7 and power generation (on-site residential or agricultural use).

8 In specifying the conditional uses, the Board of Supervisors  
9 has identified uses which have a much greater change to real  
10 property from the harvesting and sale of plants, food, and fiber  
11 crops, or the raising, production, and sale of livestock for which  
12 a use permit must be obtained from the County. Examples included  
13 in these additional, conditional use, activities are (1) larger  
14 dairies, hog farms, livestock feed lots, and poultry and rabbit  
15 facilities, (2) retail agricultural equipment sales and rental,  
16 farm supply and feed store, farmer's market, and flea market, (3)  
17 equestrian facility (over 15 clients), special events (less than  
18 1,000 people), (4) private cemetery, (5) recreational vehicle  
19 storage, (6) personal landing field, (7) telecommunications  
20 facility, (8) public utility facility, (9) slaughter/butchering  
21 (10) fabrication/storage/transport, (11) surface and subsurface  
22 mining, (12) developed campground, (13) nonmunicipal air strips and  
23 glider ports, and (14) waste disposal, food/septic. It is  
24 significant that the Board of Supervisors expressly describe the  
25 uses which are permitted without further consideration by the  
26 County, those which require further review, and those for which the  
27 issuance of an or conditional use permit are required. Not every  
28 activity is permitted merely because it is "agricultural."

1      **A Commercial Golf Course is Not Agritourism Under  
2      the Calaveras County Zoning Ordinances**

3                The Plaintiffs contend that since the commercial 18-hole golf  
4      course winds through the olive orchard, that significant revenues  
5      would be generated from golf to support the olive orchard and  
6      activities related to the olive crop, and that they will sell olive  
7      orchard products to golfers, the commercial 18-hole golf course and  
8      all of its development is permitted Agritourism as a matter of  
9      right. The Plaintiffs focus the court on the argument that it was  
10     the intention of the Ag-Coalition in drafting its definition of  
11     Agritourism to allow farmers to engage in any activities which will  
12     generate income to help underwrite the costs of the traditional  
13     agricultural activities. To accept this interpretation of the  
14     Ordinance would result in almost any and every money-making  
15     activity to be conducted by a landowner on the property, and allow  
16     activities not intended by the Board of Supervisors on agricultural  
17     property. This would render the carefully crafted permitted  
18     activities and administrative/conditional use activities a hollow  
19     shell, with Agritourism trumping this detailed set of ordinances in  
20     the County statutory scheme.

21               Consideration of the definition of Agritourism and the  
22     permitted uses thereunder begins with the plain language enacted by  
23     the Board of Supervisors. The definition of Agritourism is,

24               **17.06.0151 - Agritourism.**

25               "Agritourism" means an enterprise located at a working  
26     farm, ranch, or other agricultural operation or  
27     agricultural plant/facility conducted for the enjoyment  
28     and education of visitors, guests or clients that  
   generates income for the owner/operator. Agricultural  
   tourism refers to the act of visiting a working  
   farm/ranch or to any agricultural, horticultural or  
   agricultural operation for the purpose of enjoyment,

1 education or active involvement in the activities of the  
2 farm/ranch or agricultural operation that also adds to  
the economic viability of the agricultural operation.

3 Examples of agritourism enterprises include, but are not  
limited to, the following:

4 A. Outdoor recreation:

- 5 1. Camping/picnicking;
2. Cross country skiing;
3. Game preserve;
4. Gold panning;
5. Guide/outfitter operation;
6. Horseback riding/hiking/nonmotorized biking;
7. Wagon/sleigh rides;
8. Wildlife viewing and photography.

10 B. Direct agricultural sales:

- 11 1. Agricultural-related crafts/gifts.

12 C. Entertainment:

- 13 1. Special events;
2. Festivals;
3. Hunting/working dog trials/training;
4. Petting zoo.

15 D. Educational experiences:

- 16 1. Agricultural technical tours;
2. Crop sign identification program;
3. Exotic animal farm;
4. Garden/nursery tours;
5. Historical agricultural exhibits;
6. Historical reenactments;
7. Natural history tours;
8. Ranch/farm tours;
9. School tours;
10. Winery/vineyard tours.

22 E. Accommodations:

- 23 1. Farm/ranch vacations;
2. Guest ranch;
3. Youth exchange.

25 Calaveras County, Cal., Code § 17.06.0151.<sup>49</sup>

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27 <sup>49</sup> See also *id.* §§ 17.18.020, ¶ 21.a. and 17.16.020,  
¶ 21.a. providing that Agritourism is a permitted use on property  
28 zoned Agriculture Preserved and General Agriculture,  
respectively.

1        This general description of Agritourism activities requires  
2 that the activities must be, "an enterprise located at a working  
3 farm, ranch, or other agricultural operation or agricultural  
4 plant/facility conducted for the enjoyment and education of  
5 visitors, guests, or clients." The Board of Supervisors has  
6 included a second definition within this section, stating that  
7 "Agricultural tourism refers to the act of visiting a working  
8 farm/ranch or to any agricultural, horticultural or agricultural  
9 operation for the purpose of enjoyment, education or active  
10 involvement in the activities of the farm/ranch or agricultural  
11 operation that also adds to the economic viability of the  
12 agricultural operation." This second defined term is not used  
13 anywhere else in the Calaveras County Code, and is the  
14 corresponding definition of what the visitors, guests, or clients  
15 are doing when attending the enterprise of the property owner on  
16 the working farm, ranch, or other agricultural operation as  
17 Agritourism.

18       At this point in their argument, the Plaintiffs contend that  
19 golfers observing the olive trees from the golf carts or as they  
20 are setting up a shot to the green are enjoying the activities of  
21 the Agricultural Operation. Further, that when they purchase the  
22 olive products, they are either being educated or involved in the  
23 farming activities. Plaintiffs argue that the court should  
24 determine the plain language of the Zoning Ordinances to allow the  
25 commercial 18-hole golf course as Agritourism, or divine this as  
26 the unstated intention of the Board of Supervisors. The only  
27 limitation on Agritourism in the Plaintiffs' interpretation is that  
28 there must be less than 75 persons involved in the activity at any

1 one time.<sup>50</sup> However, the plain language of these Ordinances does  
 2 not end with the general definition of Agritourism. The Board of  
 3 Supervisors provides specific examples of the type, nature, and  
 4 quality of Agritourism under the Calaveras County Ordinances.

5 **Canons to Assist in Statutory Construction**

6 To assist and provide for consistency in statutory  
 7 interpretation, the courts have developed additional rules to be  
 8 applied in determining what is meant by a statute which is either  
 9 unclear or is based on a general definition. One common textual  
 10 canon, *in pari materia* (literally, "part of the same material")  
 11 directs that statutory language should not be looked at in  
 12 isolation, but in the entire textual context. The meaning of the  
 13 enactment may not be determined from a single word or sentence, but  
 14 the language must be construed in context, and provisions relating  
 15 to the same subject matter must be harmonized to the extent  
 16 possible. *Dyna-Med, Inc. v. Fair Employment & Housing Com.*,  
 17 43 Cal. 3d 1379, 1387 (1987). The context of the statutory  
 18 language takes into consideration the statutory purpose, other  
 19 statutes, and statutory sections relating to the same subject so  
 20 that they are harmonized, both internally and with each other, to  
 21 the extent possible. *Cal. Mfrs. Assn. v. Public Utilities Com.*, 24  
 22 Cal. 3d 836, 844 (1979).

23 A second canon of statutory construction of assistance in  
 24 determining the correct meaning of these Zoning Ordinances is  
 25 *noscitur a sociis* ("it is known from its associates"). *Cal. Farm*  
 26 *Bureau Fed. v. Cal. Wildlife Conservation Bd.*, 143 Cal. App. 4th  
 27

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28           50

*Id.*

1 173 (2006). This canon provides that the meaning of words which  
2 are placed together in a statute should be determined in light of  
3 the words with which they are associated. *Id.* This is closely  
4 related to *Eiusdem Generis* ("of the same kind"), a canon which  
5 directs that where general words follow specific words, or specific  
6 words follow general words in a statutory enumeration, the general  
7 words are construed to embrace only things similar in nature to  
8 those enumerated by the specific words. *Id.* at 181 (looking to  
9 examples enumerated in the statute to understand the scope of the  
10 ambiguous portion of the statute and narrowing that scope according  
11 to the examples provided).<sup>51</sup>

12        While general in its description of Agritourism, the Board of  
13 Supervisors provides specific examples of the scope and nature of  
14 Agritourism which qualify under the ordinance. There are five  
15 general categories of activities: (1) Outdoor recreation,  
16 (2) Direct agricultural sales, (3) Entertainment, (4) Education,  
17 and (5) Guest ranch. A commonality to each of these categories,  
18 and the enumerated activities thereunder, is that none of them  
19 provide for significant site improvements or alteration of the  
20 agricultural land for the Agritourism activity. Described  
21 Agritourism activities include camping, picnicking, game preserve,  
22 gold panning, horseback riding, sleigh rides, wildlife viewing,  
23 tours, and historical reenactments, which utilize the agricultural  
24 property in its existing form. The Board of Supervisors has used  
25 a consistent set of examples demonstrating a rural, natural state

<sup>51</sup> Not surprisingly, parallel Rules and Canons exist in federal court and provide for a similar analysis of a statute or administrative rule if it had been enacted by Congress or other federal authority.

1 use of property for Agritourism. The multi-million dollar  
2 development of agricultural land into a commercial 18-hole golf  
3 course is not consistent with the enumerated examples provided by  
4 the Board of Supervisors.

5 Several examples specified by the Board of Supervisors in the  
6 definition of Agritourism highlight the natural use, no substantial  
7 development activities. Agritourism includes the outdoor  
8 recreation activity of cross-country skiing. However, downhill or  
9 alpine skiing is not listed as an example. As is commonly known,  
10 downhill skiing requires the substantial and complex development of  
11 the land, creation of ski runs through the removal of trees and  
12 boulders, reshaping of the hill, construction of ski lifts and  
13 generators for power, and construction of other support structures.  
14 Cross country skiing is an activity designed to utilize the land  
15 in the form it exists, with minimal alteration. Another two  
16 examples are horseback riding and hiking, where one traverses the  
17 existing countryside on horse or foot rather than on a manicured  
18 course dramatically altered from its natural state.

19 Though the Plaintiffs argued that under the Zoning Ordinances  
20 a permitted use for property zoned for agriculture could include an  
21 equestrian center, no provision is made for creating an equestrian  
22 center, stables, or arena as Agritourism. Rather, the use of an  
23 equestrian center is expressly provided as a permitted use in  
24 another part of the Ordinances (which requires a conditional use  
25 permit for more than 15 clients), and subject to significant  
26 limitations before such a development is made by the landowner.<sup>52</sup>

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27  
28       <sup>52</sup> Calaveras County, Cal., Code §§ 17.16.030, 17.18.030.

1        This commercial 18-hole golf course is clearly no cross-  
2 country ski, hiking, nature walking trail. By the Plaintiffs' own  
3 accounting, the development of the commercial golf course on The  
4 Property has cost in excess of \$7,093,517.00 since 2004. There has  
5 been significant grading and altering of the natural terrain and  
6 flora. Not only is The Property not being used in its agricultural  
7 form, the existence of the golf course precludes its use for  
8 growing, harvesting, and sale of any agricultural commodity.

The plain language used by the Board of Supervisors in defining Agritourism and permitting other activities does not include a golf course on property zoned Agriculture Preserved or General Agriculture in Calaveras County as Agritourism or other permitted use. It is clear that the Board of Supervisors has expressly permitted, and conditioned in some cases, uses on agricultural property which requires any significant development or change to such property. When it has intended to permit golf as a use for land, the Board of Supervisors has expressly included it in the Zoning Ordinances. Golf is allowed for single-family, two-family, and multifamily residential (in conjunction with a master planned community), two-family residential (in conjunction with a master planned community), rural commercial, rural home industry, local commercial, general commercial, professional offices, light industrial, business park, and recreation zoned properties.<sup>53</sup> Golf is expressly provided for in 11 of the 21 Calaveras County-base property zoning districts. The court will not presume that the

<sup>53</sup> See *id.* at §§ 17.24.020, 17.26.020, 17.28.020, 17.30.030, 17.32.020, 17.34.020, 17.36.020, 17.38.020, 17.40.020, 17.44.020, and 14.46.020.

1 Board of Supervisors had a secret, unstated intention to have golf  
2 included as Agritourism on property zoned for agriculture.

3 In attempting to counter the language of the Zoning  
4 Ordinances, express provision for golf in other zoning districts,  
5 the rules and canons of statutory construction, and the language  
6 used in defining Agritourism, the Plaintiffs direct the court to  
7 consider more physically intrusive permitted activities allowed in  
8 the Zoning Ordinances on property zoned for agriculture. However,  
9 in doing so the Plaintiffs do not direct the court to Agritourism  
10 activities, but to other expressly permitted uses on properties  
11 zoned for agriculture which are not Agritourism. The Plaintiffs  
12 request this court to ignore what the Board of Supervisors  
13 expressly permits in the Zoning Ordinances, and instead have the  
14 court rewrite the statute to state what the Plaintiffs desire. The  
15 court will not insert itself into making the economic, societal,  
16 political, and practical decisions for the Calaveras County Board  
17 of Supervisors, or presume that this court has greater wisdom to  
18 write a permitted use which does not exist into the Zoning  
19 Ordinance.<sup>23</sup>

20 Golf is not a permitted activity under the Calaveras County  
21 Zoning Ordinances either prior to or after the 2005 amendments  
22 which created a permitted use for Agritourism, as defined by the  
23 Calaveras County Ordinances, for property zoned Agricultural  
24 Preserve or General Agriculture.

25  
26 **THE PLAINTIFFS FAIL TO ESTABLISH THAT CALAVERAS COUNTY  
SHOULD BE ESTOPPED FROM ENFORCING ITS ZONING ORDINANCES**

27 Notwithstanding the court determining that the golf course on  
28 the Plaintiffs' property is not a permitted purpose under the

1 Calaveras County Zoning Ordinances, the Plaintiffs assert that the  
2 County is estopped from enforcing that Zoning Ordinance with  
3 respect to the Plaintiffs' commercial 18-hole golf course. It is  
4 argued that due to County employees making representations to  
5 representatives at Community Bank of San Joaquin and the  
6 Plaintiffs, including at the November 9, 2006 meeting, the  
7 Plaintiffs and Bank would not have proceeded with the development  
8 of the golf course. As set forth in this decision, the court finds  
9 that no such representations or reliance exists, and concludes that  
10 no grounds exist to estop the County from enforcing its Zoning  
11 Ordinances.

12 The fact that the defendant is the County or the conduct to be  
13 enjoined is the enforcement of a zoning ordinance does not preclude  
14 the application of equitable estoppel. The California Supreme  
15 Court addressed this issue in *City of Long Beach v. Mansell*, 3 Cal.  
16 3d 462, 493 (1970), holding,

17 It is settled that "doctrine of equitable estoppel may be  
18 applied against the government where justice and right  
19 require it. (*United States Fid. & Guar. Co. v. State*  
20 *Board of Equalization* (1956) 47 Cal.2d 384, 388-389 [303  
21 P.2d 1034] and cases there collected.)" (*Driscoll v. City*  
22 *of Los Angeles*, *supra*, 67 Cal.2d 297, 306.) (See  
23 generally 28 Am.Jur.2d, *Estoppel and Waiver*, §§ 122-133,  
24 pp. 782-802; 31 C.J.S., *Estoppel*, §§ 138-147, pp.  
25 675-733.) Correlative to this general rule, however, is  
the well-established proposition that an estoppel will  
not be applied against the government if to do so would  
effectively nullify "a strong rule of policy, adopted for  
the benefit of the public, . . ." (*County of San Diego v.*  
*Cal. Water etc. Co.* (1947) 30 Cal.2d 817, 829-830 [186  
214, 175 A.L.R. 747], see also cases there cited.)  
The tension between these twin principles makes up the  
doctrinal context in which concrete cases are decided.

26 All four elements must be present for the doctrine of equitable  
27 estoppel to apply: (1) the party to be estopped must be apprised of  
28 the facts; (2) he must intend that his conduct shall be acted upon,

1 or must so act that the party asserting the estoppel had a right to  
 2 believe it was so intended; (3) the other party must be ignorant of  
 3 the true state of facts; and (4) he must rely upon the conduct to  
 4 his injury. *Id.* at 489.<sup>54</sup>

5       The California District Court of Appeal recently addressed the  
 6 issue of equitable estoppel being applied against a governmental  
 7 entity in *Golden Gate Water Ski Club v. County of Contra Costa*, 165  
 8 Cal. App. 4th 249 (2008). The District Court of Appeal noted that  
 9 a party faces "daunting odds" in establishing estoppel against a  
 10 governmental entity in a land-use case. The court balances,

11       the injustice done to the private party with the public  
 12 policy that would be supervened by invoking estoppel to  
 13 grant development rights outside of the normal planning  
 14 and review process. . . . Accordingly, estoppel can be  
 invoked in the land use context in only 'the most  
 extraordinary case where the injustice is great and the  
 precedent set by the estoppel is narrow.'

15 *Id.* at 259 (internal citation to *Toigo v. Town of Ross*, 70 Cal.  
 16 App. 4th 309 (1998) omitted). The District Court of Appeal stated  
 17 this conclusion, citing to *Mansell*, for the proposition that while  
 18 the doctrine of equitable estoppel is not barred in land-use cases,  
 19 it will not be applied if to do so would effectively nullify a  
 20 strong rule of policy adopted for the benefit of the public. *Id.*

21       In considering the claim of equitable estoppel, the court does  
 22 not have to address the more complex balancing of injustice to the  
 23 Plaintiffs and impact on the public policy because the Plaintiffs  
 24 have not established the basic elements for estoppel. The

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25  
 26       <sup>54</sup> However, citing back to its earlier decision, the court  
 27 in *Mansell* quoted *Sacramento v. Clunie*, 120 Cal. 29, 30 (1898),  
 28 holding that equitable estoppel will be applied against a public  
 agency only in those special cases where the interests of justice  
 clearly require it. *Mansell*, 3 Cal. 3d 462, 493 & n.30 at 396  
 (Cal. 1970).

1 Plaintiffs have not show that there were statements made by the  
2 County or its representatives concerning facts relating to the  
3 approval of the land use application upon which the Plaintiffs were  
4 intended to rely. The testimony is clear that to the extent that  
5 Ms. Moreno made any representations to the Plaintiffs and  
6 representatives of Community Bank of San Joaquin, such statements  
7 were merely an explanation of the land use application process,  
8 what the County staff was doing to move the process forward, that  
9 Ms. Moreno did not foresee opposition, and that the ultimate  
10 decision was that of the County Board of Supervisors.

11 The testimony from Mr. Nemee and the various Bank  
12 representatives was that they all understood that it was the Board  
13 of Supervisors who must approve any land use application, not Ms.  
14 Moreno or any of the County staff. In feigned outrage, Michael  
15 Nemee now testifies that it was Ms. Moreno attending the meeting  
16 which resulted in the Bank extending the due date on the  
17 Plaintiffs' loan and extending an additional \$300,000.00 in credit  
18 so that the Plaintiffs could continue with the land use  
19 application. Michael Nemee's outrage and attempted placing of  
20 blame on the County ignores the fact that it was he who requested  
21 that Ms. Moreno attend the meeting, and it was the Plaintiffs who  
22 were seeking an extension of the due date on the Plaintiffs' loan  
23 and additional credit.

24 To the extent that Michael Nemee had conversations with other  
25 County staff, such as the Agriculture Commissioner or Planning  
26 Director, none made any representations or provided any assurances  
27 that the development of a commercial golf course was permitted on  
28

1 the Plaintiffs' property.<sup>55</sup> As Jerry Howard, the then Calaveras  
2 County Agricultural Commissioner, testified, Michael Nemee  
3 represented that the golf holes being constructed were for private,  
4 personal use of the Plaintiffs, and that Mr. Howard did not  
5 consider such personal use to be contrary to the Williamson Act.  
6 Jerry Howard also testified that he did not consider, and did not  
7 make any representations to the Plaintiffs concerning, land use  
8 zoning issues because that was beyond the scope of his office. It  
9 is clear that at most, the Plaintiffs were aware that there was at  
10 best a disagreement between members of the County staff whether a  
11 private, personal use golf course could be constructed on property  
12 zoned for agriculture.<sup>56</sup>

13 The December 14, 2006 Credit Authorization Memorandum from the  
14 Community Bank of San Joaquin clearly states that the Bank knew  
15 that golf course was illegal under the existing ordinances when  
16 constructed. Consistent with the Credit Authorization Memorandum,  
17 Robert Daneke, the Bank Credit Officer at the time of the 2006  
18 meeting testified that the Bank made the loan based on the raw land

55 "No government, whether state or local, is bound to any extent by an officer's acts in excess of his authority." *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.*, 4 Cal. App. 4th 1538, 1563-1564 (1992).

23        "One who deals with the public officer stands presumptively  
24 charged with a full knowledge of that officer's powers, and is  
25 bound at his peril to ascertain the extent of his powers to bind  
26 the government for which he is an officer, and act of an officer  
necessarily incidental to a power expressly granted." *Id.*

<sup>56</sup> Any alleged agreement to permit development without application of land-use regulations would be invalid and unenforceable as contrary to public policy. *Burchett v. City of Newport Beach*, 33 Cal. App. 4th 1472, 1480 (1995).

1 value and not based on any of the golf course improvements being  
 2 made by the Plaintiffs.

3 It is also clear that the Plaintiffs proceeded with the  
 4 development of The Property knowing that it did not meet the then  
 5 existing zoning for The Property. There was no reliance on any  
 6 representations of anyone at the County that the construction of an  
 7 18-hole commercial golf course was legal.<sup>57</sup> From the evidence  
 8 presented to the court, the Plaintiffs' intentionally proceeded  
 9 with building the golf course banking on obtaining an after-the-  
 10 fact land use change by the Board of Supervisors. Given the  
 11 representation of the Plaintiffs by various professionals and  
 12 sophistication of the business endeavor, including the issuance of  
 13 securities for membership in the golf club, this is not a naive,  
 14 innocent use of The Property by the Plaintiffs.

15 In California, the Brown Act governs the conduct of county and  
 16 local governmental entities.<sup>58</sup> This law requires that government  
 17 decisions be made at public open hearings, with specified  
 18 exceptions not applicable to the Plaintiffs' land use application  
 19 at issue. This serves the obvious purpose of allowing the public  
 20 to know the decisions being made by their public officials, who  
 21 make the decisions, and an opportunity to address those public  
 22

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23                 <sup>57</sup> When a company purchases property "relying on the  
 24 initial finding of consistency by the Board, before a final  
 25 decision by the zoning administrator on the use permit  
 26 application, it takes a business risk." *Penn-Co v. Board of  
 27 Supervisors*, 158 Cal. App. 3d 1072, 1081 (1984). That landowner  
 28 cannot reasonably have assumed that this finding was "absolute  
 assurance that its application would not falter at another step  
 along the way." *Id.*

58 Cal. Gov. Code §§ 54950 et. seq.

1 officials before making the decision. Additionally, it insures  
 2 that members of the public, such as the Plaintiffs, are not taken  
 3 into the "backroom" and improper demands made of them, or that  
 4 special treatment is secretly provided which is not obvious to the  
 5 public. *Epstein v. Hollywood Ent. Dist. II Bus. Improvement Dist.*,  
 6 87 Cal. App. 4th 862, 868 (2001). Here, the decision was  
 7 ultimately made at a public hearing by the Board of Supervisors  
 8 which everyone knew was the decision making authority.

9 The Plaintiffs may not like the decision of the Board of  
 10 Supervisors on their land-use application, but they are not  
 11 entitled to a different decision because they gambled and developed  
 12 the land for a commercial 18-hole golf course in the belief that  
 13 they could convince a majority of the Board of Supervisors to make  
 14 it legal after the fact.<sup>59</sup>

15 The Plaintiffs have also attempted to weave into the argument  
 16 that because the County may allow uses of other property by the  
 17 owner of Ironstone Vineyards which the Plaintiffs contend are  
 18 inconsistent with the Court's interpretation of Agritourism, the  
 19 County cannot enforce the Ordinances against the Plaintiffs. This  
 20 contention misses the mark for several reasons. Though referenced  
 21 by the Plaintiffs, the use of property by Ironstone is not now  
 22 before the court. Further, as argued by the County, there are  
 23 other permitted uses under the Zoning Ordinances which may apply to  
 24 the Ironstone uses. The court has not, and cannot, determine the  
 25 uses of property by Ironstone in the case now before the court.

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26  
 27       <sup>59</sup> The construction of additional structures nor the cost  
 28 associated with those structures, support the application of  
           equitable estoppel. *Golden Gate Water Ski Club*, 165 Cal. App. 4th  
           at 259.

1       Purported ignorance of the law is not an excuse for either a  
2 civil or criminal violation of the law. *Jerman v. Carlisle,*  
3 *McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. \_\_\_, 130 S. Ct. 1605,  
4 1612 (2010). To the extent that the Plaintiffs contend that based  
5 on Ironstone's conduct the Plaintiffs believed that their  
6 development was permitted, it is not a valid argument. First, the  
7 Plaintiffs are responsible for their conduct, not the conduct of  
8 Ironstone. To the extent that Ironstone is violating the law, the  
9 County and State have the responsibility to enforce the laws, or  
10 for other residences of Calaveras County to assert their rights if  
11 the County is engaging in differential enforcement of the law. The  
12 Plaintiffs cannot argue that since someone else is allowed to break  
13 the law, then the Plaintiffs are allowed to break the law. Second,  
14 the Plaintiffs knew that developing and operating the commercial  
15 18-hole golf course is not permitted under the Zoning Ordinances.  
16 Third, as stated above, permitted uses other than Agritourism may  
17 exist for the Ironstone uses, and those uses are not determinative  
18 of the Plaintiffs' development and use of The Property.

19       The Plaintiffs have failed to establish by a preponderance of  
20 the evidence each of the independent necessary elements of  
21 estoppel: that (1) the County made representations intended to  
22 induce reliance by the Plaintiffs in developing an 18-hole golf  
23 course, (2) the County acted in a manner causing the Plaintiffs to  
24 believe that it was legal for them to construct a commercial golf  
25 course on The Property, (3) that the Plaintiffs were ignorant of  
26 the fact that an 18-hole commercial golf course was not a legally  
27 permitted use on The Property as it was and is currently zoned, and  
28 (4) that the Plaintiffs relied on the representations or acts of

1 the County in proceeding with the development of the 18-hole  
2 commercial golf course on The Property. The request for equitable  
3 estoppel to be applied to prevent the County from enforcing the  
4 Calaveras County Zoning Ordinances as to the golf course use on The  
5 Property is denied.

6 **CALAVERAS COUNTY IS ENTITLED TO INJUNCTIVE RELIEF**

7 In its Counterclaim, the County requests that the court  
8 determine that the use of The Property as a commercial golf course  
9 is a violation of Calaveras County Code § 17.18, and that such use  
10 is a public nuisance because it constitutes an actual or threatened  
11 injury to the public health, safety or welfare and interferes with  
12 the comfortable enjoyment of life or property by residents and  
13 property owners of the County. Further, that the court issue  
14 injunctive relief ordering the Plaintiffs, and their employees,  
15 servants, and assigns, and all persons acting in concert with them  
16 to:

- 17 1. Stop all commercial use of the golf course on The  
18 Property, including the use of the golf course with a  
payment for any other activity on The Property.
- 19 2. Stop all use of the golf course by any person who has  
20 purchased a golf membership or other financial interest  
21 in The Property, or in any adjacent property owned or  
controlled by either Plaintiffs or relatives of  
Plaintiffs in exchange for the right to use the golf  
course.
- 22 3. Stop any private, public, or charitable events on The  
23 Property that involve the payment of money, purchase of  
raffle tickets, or any other financial payment in  
conjunction with attending an event when the event  
includes the use of the golf course by attendees.
- 24 4. Stop advertising or otherwise marking commercial use of  
the golf course located on The Property, including but  
not limited to advertising free golf when payment is made  
to use The Property for any permitted use under the  
Calaveras Zoning Ordinances.

1       5. Stop using The Property for any purpose which does not  
2 comply with all applicable laws and regulations or for  
3 which all required permits and approvals have not been  
4 obtained, including but not limited to failure to comply  
5 with parking standards and event requirements.

6       The County further requests that the court authorize the  
7 County to abate the nuisance at the Plaintiffs' expense if the  
8 Plaintiffs have not complied within 60 days of the court's judgment  
9 for the permanent injunction. Further, that pursuant to California  
10 Civil Code § 3491 and Government Code § 54988, the County seeks an  
11 award of its costs, including but not limited to investigation and  
12 enforcement costs, costs of this Adversary Proceeding, and  
13 attorneys' fees.

14       A local governmental entity may invoke appropriate civil  
15 remedies to enforce its ordinances pursuant to the police power  
16 granted to it under the California Constitution. Art. XI, § 11.  
17 This includes obtaining injunctive relief to restrain the violation  
18 or to cause the wrongful effect thereof to be removed. *City of*  
19 *Santa Clara v. Paris*, 76 Cal. App. 3d 338, 342 (1977); *see also*,  
20 *Yuba City v. Cherniavsky*, 117 Cal. App. 568, 572 (1931); *Stockton*  
21 *v. Frisbie & Latta*, 93 Cal. App. 277, 289 (1928). As discussed by  
22 the District Court of Appeal in *San Francisco v. Burton*, 201 Cal.  
23 App. 2d 749, 757 (1962), there is no need for the governmental  
24 entity to show that a nuisance *per se* exists; the right of a  
25 governmental entity to enforce its ordinance by injunction was not  
26 open to question.

27       The County, by the actions of the Board of Supervisors in  
28 enacting the Zoning Ordinances, has determined what uses may be  
made of real property in various parts of Calaveras County. The  
use of The Property for a commercial golf course is not permitted

1 and is determined to improper under the zoning ordinance. The  
2 Plaintiffs have shown no basis for why or how their use of The  
3 Property as a commercial golf course does not violate the Zoning  
4 Ordinances or why they should be allowed to operate a commercial  
5 golf course in violation of the Zoning Ordinances. The 18-hole  
6 commercial golf course being operated on The Property is a public  
7 nuisance.

8 The court grants the request for injunctive relief and the  
9 judgment on the Counterclaim shall provide that the Plaintiffs, and  
10 each of them, and their agents, representatives, assigns,  
11 transferees and anyone asserting an interest or right from the  
12 Plaintiffs, and any entities in which the Plaintiffs have an  
13 interest, are permanently enjoined and shall, effective January 27,  
14 2012, and continuing thereafter

- 15       a. Terminate and cease the use of the golf course on The  
16       Property as a commercial golf course for which payment,  
17       remuneration, credit, transfer, or anything of value is  
18       given to or for the benefit of Michael Nemee and Michelle  
19       Nemee, and each of them, and their respective family  
20       members, agents, employees, servants, representatives,  
21       and any entity in which Michael Nemee or Michelle Nemee  
22       have an ownership, equitable, or other interest, directly  
23       or indirectly, from any other person or entity for the  
24       use of said golf course.
- 25       b. Terminate and cease allowing the use of the golf course  
26       on The Property by any person who claims or asserts that  
27       they have purchased a golf membership, obtained any other  
28       right, or have received authorization to use the golf  
     course for any purpose for which remuneration, credit,  
     transfer, or anything of value is given to or for the  
     benefit of Michael Nemee and Michelle Nemee, and each of  
     them, and their respective family members, agents,  
     employees, servants, representatives, and any entity in  
     which Michael Nemee or Michelle Nemee have an ownership,  
     equitable, or other interest, directly or indirectly.
- 29       c. Terminate and cease the using or allowing the use of the  
30       golf course on The Property for any private, public, or  
31       charitable events for playing golf or any golf related  
32       activity.

- 1                   d. Terminate and cease advertising or otherwise marking for  
2 commercial use the golf course located on The Property,  
3 and the use of the golf course on The Property by any  
4 person other than the Owners in exchange for payment,  
5 remuneration, credit, transfer, or anything of value is  
6 given to or for the benefit of Michael Nemee and Michelle  
7 Nemee, and each of them, and their respective family  
8 members, agents, employees, servants, representatives,  
9 and any entity in which Michael Nemee or Michelle Nemee  
10 have an ownership, equitable, or other interest, directly  
11 or indirectly, from any other person or entity for the  
12 use of the golf course.
- 13                  e. Michael Nemee and Michelle Nemee, and each of them, and  
14 their respective family members, agents, employees,  
15 servants, representatives, and any entity in which  
16 Michael Nemee or Michelle Nemee have an ownership,  
17 equitable, or other interest, shall comply with the  
18 Calaveras County Zoning Ordinances for the use of The  
19 Property, for the use and maintenance of the golf course  
20 on The Property.

21                 Michael Nemee and Michelle Nemee, and each of them, may seek  
22 to modify this injunction to the extent that it becomes  
23 inconsistent with future amendments to the Calaveras County,  
24 California Zoning or other ordinances concerning the use of the  
25 property identified in this judgment.

26                 The County may obtain from this court further orders for the  
27 enforcement of this injunctive relief as necessary for the  
28 abatement of the public nuisance, and seek the award of costs and  
expenses of such abatement, if Michael Nemee and Michelle Nemee,  
and each of them, and their respective family members, agents,  
employees, servants, representatives, and any entity in which  
Michael Nemee or Michelle Nemee have an ownership, equitable, or  
other interest, fail to comply with this injunction on or before  
January 27, 2012.

Further, that pursuant to California Civil Code § 3491 and  
Government Code § 54988, the County may file a costs bill and

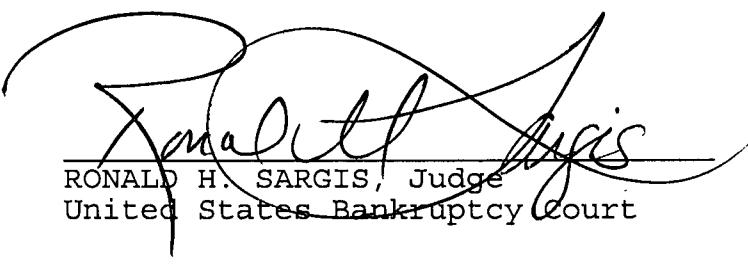
1 motion for award of attorney's fees and expenses in connection with  
2 enforcing the Zoning Ordinances for the conduct subject to the  
3 permanent injunction, as determined reasonably and necessary by  
4 this court pursuant to a post-judgment costs bill and fee  
5 application filed on or before December 9, 2011.

6 **CONCLUSION**

7 The court shall enter judgment in favor of the Defendant  
8 Calaveras County on the Seconded Amended Complaint denying all  
9 relief requested by the Plaintiffs. Further, the court shall enter  
10 judgment on the Counterclaim in favor of Calaveras County and  
11 against the Plaintiffs, and each of them, for a permanent  
12 injunction enjoining the use of the 18-hole golf course on The  
13 Property, authorizing the County to abate the continued used of the  
14 18 hole golf course on The Property through the enforcement of the  
15 permanent injunction issued by this court, and awards costs, fees,  
16 and expenses to the County. The permanent injunction is granted  
17 based on the Calaveras County Zoning Ordinances in effect as of the  
18 date of the injunction, and is subject to modification based on  
19 future amendments to the Zoning Ordinances for the permitted uses  
20 of The Property.

21 The court shall by supplemental order issue a draft of the  
22 proposed judgment form, affording the parties to state any  
23 objection to the from and content of the order, and propose any  
24 corrected or additional language in writing.

25 Dated: November 21, 2011

26  
27   
RONALD H. SARGIS, Judge  
28 United States Bankruptcy Court